(2)

No. 91-2014

Supreme Court, U.S.
FILED
JUL 13 1992
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

O'NEILL GROUP, *et. al.*, *Petitioners*

v.

CONTINENTAL AIRLINES CORP., *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

BARRY P. SIMON
SENIOR VICE PRESIDENT
AND GENERAL COUNSEL
DANIEL P. CASEY
ASSOCIATE GENERAL COUNSEL
CONTINENTAL AIRLINES, INC.
2929 ALLEN PARKWAY
HOUSTON, TEXAS 77019
(713) 834-2273

CHARLES A. SHANOR*
JOHN J. GALLAGHER
JON A. GEIER
PAUL, HASTINGS, JANOFSKY & WALKER
1050 CONNECTICUT AVE., N.W.
TWELFTH FLOOR
WASHINGTON, D.C. 20036
(202) 223-9000

July 13, 1992

ATTORNEYS FOR RESPONDENT

* *COUNSEL OF RECORD*

QUESTIONS PRESENTED

1. Whether Section 502 of the Bankruptcy Code grants employees who strike their debtor-in-possession employer rights superior to those of strikers in all other circumstances, such that they become entitled to wages and benefits for the time period during which they voluntarily withheld their services and did not work?

2. Whether Section 502 of the Bankruptcy Code grants employees who had no guarantee of future employment an entitlement to future wages and benefits as contract rejection damages for the time period after which the debtor-in-possession employer would have ceased operations?

LIST OF PARTIES

The O'Neill Group, Petitioners in this Court and appellants in the court of appeals, were originally four hundred fifty-two past or present pilots and flight attendants of Continental Airlines, Inc. Annex A to the O'Neill Group's Application to Extend Time to File a Petition for Writ of Certiorari, filed on January 8, 1991 (No. A-528) lists all of the Petitioners. Four hundred of the four hundred fifty-two original Petitioners have settled the claims at issue here.

Respondent and appellee in the court of appeals is Continental Airlines Corp., a corporate predecessor of Continental Airlines, Inc.

RULE 29.1 STATEMENT

Continental Airlines, Inc. is a wholly owned subsidiary of Continental Airlines Holdings, Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

RULE 29.1 STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 2

ARGUMENT IN OPPOSITION TO CERTIORARI . . 6

I. THE DECISION BELOW CONFLICTS WITH NO DECISION OF THIS COURT OR OF ANY OTHER COURT OF APPEALS 6

II. BOTH SETTLEMENTS OF CLAIMS AND PASSAGE OF A NEW STATUTE DRAMATICALLY DIMINISH THE IMPORTANCE OF THIS CASE 9

III. THE DENIAL OF PETITIONERS' CLAIMS TURNED ON FACTUAL ISSUES, NOT QUESTIONS OF LAW APPROPRIATE FOR THIS COURT'S RESOLUTION 11

IV. THE DECISION BELOW CORRECTLY APPLIED THE LAW 12

A. Strikers Are Not Entitled To Claim Wages For Periods When They Struck Their Employer . . 14

B. Employees Are Not Entitled To Damages For Future Wages For Time Periods After The Employer Would Have Ceased To Do Business Had It Paid Such Wages 17

CONCLUSION 18

TABLE OF AUTHORITIES

CASES: Page(s)

Air Line Pilots Ass'n v. O'Neill,
111 S. Ct. 1127 (1991) 4
American Ship Bldg. Co. v. NLRB,
380 U.S. 300 (1965) 15
Comfort, Inc., 152 N.L.R.B. 1074 (1965), *enforced*,
365 F.2d 867 (8th Cir. 1966) 14
*Empresa Ecuatoriana de Aviacion, S.A. v.
District Lodge No. 100*, 690 F.2d 838
(11th Cir. 1982), *cert. dismissed*,
463 U.S. 1250 (1983) 14
IAM v. Central Airlines, Inc.,
372 U.S. 682 (1963) 15
IBEW v. A-1 Electrical Serv.,
535 F.2d 1 (10th Cir.), *cert. denied*,
429 U.S. 832 (1976) 17
In re Altair Airlines, Inc.,
727 F.2d 88 (3d Cir. 1984) 14
In re Continental Airlines Corp.,
38 B.R. 67 (Bankr. S.D. Tex. 1984) 3
In re Continental Airlines Corp., 50 B.R. 342
(S.D. Tex. 1985), *aff'd*, 790 F.2d 35
(5th Cir. 1986) 14
In re Continental Airlines Corp.,
57 B.R. 845 (Bankr. S.D. Tex. 1985) 11, 17
In re Continental Airlines,
928 F.2d 127 (5th Cir. 1991) 2
In re Nuisance Corp., 17 B.R. 80
(Bankr. D.N.J. 1981) 13
In re Roth American, Inc., 120 B.R. 356
(Bankr. M.D. Pa. 1990) 8

TABLE OF AUTHORITIES - CONTINUED

Page(s)

In re U.S. Truck Co., 89 B.R. 618 (E.D. Mich. 1988), *aff'g* 74 B.R. 515 (Bankr. E.D. Mich. 1987) 8

International Bhd. of Teamsters v. IML Freight, Inc., 789 F.2d 1460 (10th Cir. 1986) 7

J.H. Rutter-Rex Mfg. Co. v. NLRB, 399 F.2d 356 (5th Cir. 1968), *rev'd on other grounds*, 396 U.S. 258 (1969) 14

J.I. Case Co. v. NLRB, 321 U.S. 332 (1944) 11, 17

Mazirow v. Grigsby (In re White Motor Corp.), 44 B.R. 563 (N.D. Ohio 1984) 13

National Airlines, Inc. v. IAM, 416 F.2d 998 (5th Cir. 1969), *after remand*, 430 F.2d 957 (5th Cir. 1970) 14

NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984) 8, 10, 13, 16

NLRB v. MacKay Radio & Tel. Co., 304 U.S. 333 (1938) 15

NLRB v. Southern Greyhound Lines, 426 F.2d 1299 (5th Cir. 1970) 14

Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941) 14

Textile Workers Union v. Lincoln Mills of Alabama, 353 U.S. 448 (1957) 15

TABLE OF AUTHORITIES - CONTINUED

Page(s)

STATUTES:

11 U.S.C. § 108(c)(2) 2
28 U.S.C. § 1254 (1) 2
Bankruptcy Code
11 U.S.C. § 1113 . . . . . 10, 16
11 U.S.C. § 1113(e) 10
11 U.S.C. § 502(b)(1) 13

LEGISLATIVE MATERIALS:

130 Cong. Rec. No. 92 (June 29, 1984) 10

TREATISES:

3 Collier on Bankruptcy ¶ 502.02
(15th ed. 1992) 12, 14

MISCELLANEOUS:

Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*,
91 Yale L.J. 857 (1982) 13
Thomas H. Jackson, The Logic and Limits of Bankruptcy Law, Harvard Univ. Press
(1986) 13

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

O'NEILL GROUP, *et. al.*, *Petitioners*

v.

CONTINENTAL AIRLINES CORP., *Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent Continental Airlines Corp. respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the Fifth Circuit's opinion in this case.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit is reported at 901 F.2d 1259 (5th Cir. 1990) (Pet. App. A). The Fifth Circuit's order denying petitions for rehearing and suggestions for rehearing *en banc* is unreported (Pet. App. G.). The district court's order, filed March 13, 1989, is unreported (Pet. App. E). The bankruptcy court order dated September 10, 1985 is unreported (Pet. App. B), its order dated May 8, 1986 is unreported (Pet. App. C), and its order dated June 26, 1986 is reported at 64 Bankr. 865 (Bankr. S.D. Tex 1986) (Pet. App. D).

JURISDICTION

This Court, on January 9, 1991, extended the time for filing a writ of certiorari to March 28, 1991, No. A-528. On March 21, 1991, the Fifth Circuit Court of Appeals confirmed that Respondent Continental Airlines Inc.'s ("Continental") bankruptcy petition stayed appellate proceedings arising from an earlier bankruptcy, *In re Continental Airlines,* 928 F.2d 127 (5th Cir. 1991) (Pet. App. H), automatically extending the time for petitioning this Court pursuant to 11 U.S.C. Section 108(c)(2).[1/] The automatic stay was lifted on May 12, 1992 (Pet. App. J), and thereafter the petition for certiorari was timely filed under 11 U.S.C. Section 108(c)(2). This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1).

STATEMENT OF THE CASE

After suffering over $500 million in losses during the first five years of airline deregulation, Continental suspended its domestic operations and filed a bankruptcy petition on September 24, 1983. On September 27, 1983, Continental resumed a reduced level of operations and filed a motion with the bankruptcy court to reject its collective bargaining agreements with the Air Line Pilots Association ("ALPA") and the Union of Flight Attendants ("UFA"). The same day, Continental issued "emergency work rules" that

---

1/ A corporate predecessor of Continental ("Old Continental") filed a petition in bankruptcy on September 24, 1983. *In re Continental Airlines Corp.*, Consolidated Case No. 83-04019-H2-5 (Bankr. S.D. Tex.) The contract rejection damages claims at issue here were filed against Old Continental, which emerged as a new entity from bankruptcy on September 2, 1986, pursuant to a confirmed plan of reorganization. The reorganized Continental filed its bankruptcy petition on December 3, 1990. *In re Continental Airlines, Inc.*, Case Nos. 90-932 through 90-984 (Bankr. D. Del.) Old Continental is hereinafter referenced as Continental.

called for lower wages and fewer restrictions on the availability of pilots and flight attendants for duty. The new wages and work rules mirrored those in union contracts agreed to in the then-recent reorganization of another carrier, Braniff Airways. ALPA and UFA, including all members of Petitioners, the O'Neill Group, went on strike beginning October 1, 1983.[2/]

On June 17 and December 5, 1984 respectively, the bankruptcy court approved rejection of the ALPA and UFA collective bargaining agreements. (The bankruptcy court's subsequent Memorandum of Authorities Authorizing Rejection of Airline Pilots Association Collective Bargaining Agreements is reproduced at Appendix A hereto.) The court's now-final orders rejecting the labor contracts found that the emergency work rules, adopted only after "considerable and reasonable efforts" by Continental to obtain voluntary modification of the agreements, were necessary for Continental to "compete effectively with the low cost carriers in direct competition with it."[3/] Despite this judicial finding,

---

2/ In addition to striking, ALPA and UFA moved to dismiss Continental's bankruptcy petition on the grounds it was filed in bad faith and that the rejection of the union contracts would violate the United States Constitution. *In re Continental Airlines Corp.*, 38 B.R. 67, 69 (Bankr. S.D. Tex. 1984). The bankruptcy court denied the unions' motion finding that Continental "filed . . . for the purpose of attempting to keep the companies alive and functioning and that they had no other viable alternative to that end." *Id.* at 71.

3/ In contrast, the bankruptcy court found that ALPA "does not intend to reach an agreement with Continental on terms the airline can afford." Res. App. A at 16A, that ALPA "appears to have strong motives for seeing that the carrier is shut down as an example to the other carriers whose pilots are represented by this large and extremely powerful union" (*id.*), and that "ALPA's action to shut down Continental and/or to deprive it of profitability reflects on ALPA's good faith in bargaining and on any equities involved." *Id.* at 16A.

the UFA strike continued until April 17, 1985 and the ALPA strike continued until October 31, 1985.

On April 26, 1985, ALPA filed bankruptcy claims for all Continental pilots, $408 million of which was for alleged damages arising from rejection of its collective bargaining agreement with Continental.[4/] Three days later, UFA filed claims for the flight attendants, $409 million of which was for damages claimed to arise from rejection of the UFA's collective bargaining agreements with Continental. Both claims for future wages were premised on (1) full pay and benefits until dates long subsequent to expiration of the collective bargaining agreements, and (2) full pay and benefits for all striking employees during the period when the employees did no work because they were on strike.

In October 1985, the bankruptcy court approved an agreement between Continental and ALPA intended to settle all issues between the parties, including the pilots' contract rejection damage claims.[5/] Continental subsequently reached a similar settlement with UFA which likewise was approved by the court. Certain pilots and flight attendants, including Petitioners O'Neill Group, raised objections to these settlements. These objectors were permitted to opt out of the settlement and file proofs of claim for their pro rata portions of the claims originally filed by ALPA and UFA.

Continental, seeking to dispose of the contract rejection claims, filed a motion for partial summary judgment

---

4/ Prepetition wage claims, which have been paid in full to all claimants, are not at issue here.

5/ The Continental-ALPA settlement agreement has previously been reviewed by this Court in *Air Line Pilots Association v. O'Neill*, 111 S. Ct. 1127 (1991).

which asked the bankruptcy court to disallow contract rejection damages claims for the period when the claimants were on strike. This motion was granted on September 10, 1985. An additional motion filed by Continental to disallow all remaining claims for contract rejection damages was granted as to the flight attendants on May 8, 1986 and as to the pilots on June 26, 1986. These two orders held the claimants were not entitled to future wages and benefits because they were not guaranteed future employment under the collective bargaining agreements. All three orders, when appealed to the federal district court, were affirmed.

The O'Neill Group then appealed to the Fifth Circuit Court of Appeals. The Fifth Circuit, in an opinion written by Judge Gee, upheld the order disallowing damages for the period when the employees were on strike ("the strike order") but reversed and remanded the orders disallowing all pre-strike claims ("the business cessation orders"). Judge Garwood, who filed a partial dissent as to the strike order, would have allowed damages for the difference between the collectively-bargained rates of pay and the emergency work rules rates of pay, even though the strikers did not work during this period. As to the business cessation order, the Court unanimously held that, from the date of the bankruptcy petition until some date prior to January 30, 1984 when "Continental would have run...[out] of cash" and "would have had to shut its doors,"[6/] nonstriking employees should receive contract damages claims for the difference between the collectively-bargained rates of pay and the emergency

---

6/ A separate, final, bankruptcy court Order had previously found that Continental's Bankruptcy was caused by financial circumstances so dire that "Continental would have run [out] of cash and would no longer be operating at the present time. It would have had to shut its doors even before this hearing commenced [January 30, 1984]." Res. App. A at 30A.

work rules rates of pay. The Fifth Circuit remanded the case for precise specification of that date.

ARGUMENT IN OPPOSITION TO CERTIORARI

The writ should be denied. The decision below does not conflict with any decision of this Court or any other court of appeals; the significance of the questions presented is minimal -- most Petitioners no longer have live claims and legislation inapplicable to this proceeding makes such claims less likely to occur in the future; the allowability of petitioners' claims turned on factual issues not appropriate for review by this Court; and the court of appeals decision is, in all particulars, a correct application of both law and policy.

I. THE DECISION BELOW CONFLICTS WITH NO DECISION OF THIS COURT OR OF ANY OTHER COURT OF APPEALS

As Petitioners argued in their Suggestion for Rehearing En Banc to the Fifth Circuit (at p. 5), the decision of the panel below is "the first reported appellate decision in the country concerning the proper measure of contract rejection damages [under the Bankruptcy Code]." Because there is no split in the circuits concerning application of Bankruptcy Code Section 502 to either the strike issue or the business cessation issue, this case does not warrant this Court's consideration.

The Petition's complaint (Pet. at 8-14) that strikers should be paid in full for time they are on strike against their employer is simply not the law, either inside or outside

bankruptcy.[7/] Petitioners' leading case for the notion that they should have received damages for their time on strike, *International Brotherhood of Teamsters v. IML Freight, Inc.*, 789 F.2d 1460 (10th Cir. 1986) ("IML Freight") did not involve a claim for wages at collective bargaining agreement rates for striking employees. The main issue in *IML Freight* was the propriety of a debtor's rejection of a collective bargaining agreement, an issue not present here. Indeed, unlike the present case, the court disapproved the debtor's attempt to reject its collective bargaining agreement. Therefore, there were no Section 502 damage claims from rejection of that agreement. The Tenth Circuit's discussion of damages was limited to the proposition that rejection of a collective bargaining agreement could give rise to damage claims, just as the Fifth Circuit decided here. The Tenth Circuit did not decide, or even discuss, whether strikers should receive damages covering time on strike.

The second half of the petition (Pet. at 14-22) argues that the Fifth Circuit erred in holding that damages for rejection of a collective bargaining agreement (which does not guarantee future employment) should exclude the time period after which the debtor/employer would have ceased to employ anyone. Petitioners' rhetoric that the decision below "contravenes basic bankruptcy law" proves, upon inspection, to be hollow; there is no conflict between the decision below and any decision of this Court or any other court of appeals.

7/ Petitioners assert, without authority, that the decision below creates a conflict between the so-called "right to strike" and the so-called "right to contract rejection damages." No such conflict exists. The strike order upholds well settled labor law principles that strikers have no claim for wages for time not worked. The business cessation order *affirmed* the right to contract rejection damages. *See* Sec. IV, *infra*.

Petitioners' so-called "contradiction" of the decision below with *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984) (hereafter *Bildisco*), is disingenuous. *Bildisco* acknowledged the propriety of judicial estimation of contingent and unliquidated claims; all the Fifth Circuit did was apply *Bildisco*, saying that such estimation results in a claim which is limited by the exclusion of damages for those times when the claim would not have been otherwise recoverable due to the employer's financial collapse. *Bildisco* did not involve such a factual twist, and no appellate decision has held contrary to the Fifth Circuit on this issue.

Petitioners' best effort to claim a conflict with any aspect of the decision below rests upon *In re U.S. Truck Co.*, 89 B.R. 618 (E.D. Mich. 1988), *aff'g* 74 B.R. 515 (Bankr. E.D. Mich. 1987). Even if it were appropriate for this Court to deal with a "split of authority" between the Fifth Circuit and one district court, there is no such split here. The cases are factually distinct. The district court in *U.S. Truck* said that "the court cannot say what would have happened had the company decided to liquidate," *Id.* at 626, while the bankruptcy judge here specifically found that Continental would have ceased to operate between the petition date and January 30, 1984. Res. App. A. at 30A. All the Fifth Circuit did was to remand to the fact-finder for a further specification as to that precise date; no comparable fact pattern existed in *U.S. Truck*.[8/]

8/ The only decision since the Fifth Circuit's decision in this case holds, citing the Fifth Circuit, that "Damages, if any, would only be available for the time that Roth American would have been able to continue in business." *In re Roth American, Inc.*, 120 B.R. 356, 360 (Bankr. M.D. Pa. 1990).

II. BOTH SETTLEMENTS OF CLAIMS AND PASSAGE OF A NEW STATUTE DRAMATICALLY DIMINISH THE IMPORTANCE OF THIS CASE

Petitioners neglect to discuss two factors which dramatically reduce the practical importance of this case.

Petitioners allege that the decision below "deprives more than 450 Continental employees of their sole remedy for Continental's breach of its labor contracts" and that "the magnitude of the harm in this case alone is sufficient to warrant certiorari review." Pet. at 12. This is not true. Petitioners failed to inform the Court that, on November 26, 1991, the Delaware Bankruptcy Court approved a settlement between Continental and the O'Neill Group which allowed individual pilots and flight attendants to settle their contract rejection damage claims. (The bankruptcy court's Order Approving O'Neill Group Settlement is reproduced at Appendix B hereto). As a result of that settlement 305 of the approximately 435 pilot Petitioners here elected to settle such claims. All 17 of the flight attendant members of the O'Neill Group agreed to settle. Petitioners also failed to inform the Court that an additional 78 pilot Petitioners agreed to settle their contract rejection claims pursuant to Continental's 1985 settlement with ALPA. Thus, there are now only 52 hold-outs who would receive any benefit from even a total reversal of the decision below.[9/]

Moreover, the legal framework for resolving collective bargaining agreement rejection issues has changed

---

9/ Moreover, all of the Petitioners with live claims were on strike subsequent to October 1, 1983, and thus would only be eligible for six days of damages (September 24, 1983 through September 30, 1983) if the Court were to reverse the business cessation orders but affirm the strike order.

dramatically since this case was filed in September 1983. In all Chapter 11 bankruptcy cases filed after July 10, 1984, Section 1113 of the Bankruptcy Code, 11 U.S.C. § 1113, governs assumption and rejection of collective bargaining agreements. Were Continental's petition to be filed today, its collective bargaining agreements would remain in effect until the bankruptcy court ruled on the company's petition to reject the agreements or until such time as the court, after notice and a hearing, authorized adoption of interim work rules. 11 U.S.C. § 1113(e). No longer is it the case that, as here, "the filing of the petition in bankruptcy means that the collective-bargaining agreement is no longer immediately enforceable, and may never be enforceable again." *Bildisco,* 465 U.S. at 532.

Although the claims provisions in Bankruptcy Code Section 502 were not directly affected by Section 1113, the chances that such claims will occur has been diminished. The legislative history of Subtitle J of H.R. 5174 (P.L. 98-353), codified as 11 U.S.C. § 1113, reflects Congress' view that the new provision would help to avoid rejection of collective bargaining agreements in Chapter 11 proceedings, thus obviating Section 502 claims for breach of such an agreement.[10/] Section 1113 was intended to promote bargaining for new agreements between debtors and their unions and thus to diminish the instances in which a contract is rejected or acrimony causes a lengthy strike against a

---

10/ *See e.g.*, 130 Cong. Rec. No. 92 (June 29, 1984), at H 7489 (Mr. Rodino: "The provision ensures that a process of negotiation will take place between the employer and union in a reorganization case before the hearing for rejection of the collective bargaining agreement is commenced."), at S 8891 (Sen. Hatch: "Only if these good faith negotiations fail does the court get involved in granting an application to reject a contract."), and at S 8898 (Sen. Kennedy: "[Section 1113 is intended] to substitute a rule of law that encourages the parties to solve their mutual problems through the collective bargaining process.").

financially distressed debtor. Congress, in short, enacted Section 1113 in an effort to substitute negotiated resolutions for such strikes as the lengthy ALPA/UFA strikes against Continental.

III. THE DENIAL OF PETITIONERS' CLAIMS TURNED ON FACTUAL ISSUES, NOT QUESTIONS OF LAW APPROPRIATE FOR THIS COURT'S RESOLUTION

The O'Neill Group's strike-related claims (Pet. at 8-14) founder because of two factual shortcomings. First, Petitioners are unable to point to any provision of their collective bargaining agreements which would support a claim for pay during any period they were on strike. Thus, they lack a factual prerequisite for a claim for wages allegedly lost during that time period. Second, Petitioners are collaterally estopped from claiming that they weren't on strike, but had been constructively discharged by the bankruptcy court's unappealed finding that the strikers were *not* constructively discharged.[11/] In short, the courts below found no terms of Continental's collective bargaining agreements with either ALPA or UFA which displaced or modified the legal doctrine that an employee who withholds his labor is entitled to no compensation for the time he is on strike, and the courts

---

11/ The bankruptcy court expressly held that Continental made "strenuous efforts to get the pilots to return to work" after filing its bankruptcy petition and that this effort "refutes the constructive discharge claim." *In re Continental Airlines Corp.*, 57 B.R. 845, 851 (Bankr. S.D. Tex. 1985). The court specifically rejected the "suggestion that rejection of the contracts alone gives rise to a claim for wrongful discharge damages." *Id.* at 852. Petitioners, belatedly recognizing the difficulty these factual findings create for their case, disingenuously seek in fn. 6 to argue there was no such factual finding or that somehow an *ex parte* letter written in a non-adversarial context by an official at the Department of Labor can overturn the findings of the bankruptcy court.

below specifically rejected petitioners' argument that they were constructively discharged.

The O'Neill Group's argument (Pet. at 14-22) that employee claims should have continued accruing even after Continental would have ceased doing business and ceased to employ anyone is similarly undercut by factual shortcomings. As this Court has held, collective bargaining agreements typically only prescribe wages and conditions of employment and do not guarantee future employment. *See, e.g., J.I. Case Co. v. NLRB,* 321 U.S. 332 (1944). Here, because there was no employment contract guaranteeing employment, the Court of Appeals directed the bankruptcy court to calculate the *amount* of the employee claims *under this contract,* taking into account the point in time at which the bankruptcy judge, with his extensive knowledge of the debtor's financial affairs, estimated that the debtor would have ceased doing business and therefore would have had no jobs for petitioners.

Such estimation or liquidation of claims is inherent to the claims administration process. Estimation of the value of future claims is inherently factual and often imprecise, even speculative. *See, e.g.,* 3 Collier on Bankruptcy ¶ 502.02 (15th ed. 1992) ("virtually all matters involving the allowability of claims and their right therefore to share in the assets of the debtor ordinarily will be determined by the bankruptcy judge, generally exclusive of all other courts").

IV. THE DECISION BELOW CORRECTLY APPLIED THE LAW

The rejection of Continental's collective bargaining agreements was governed by Bankruptcy Code Section 365. Prior to enactment of Section 1113 to deal specifically with rejection of collective bargaining agreements, Section 365 permitted employers in bankruptcy to reject collective

bargaining agreements and set new employment terms. Claims of employees resulting from such rejection, as this court held in *NLRB v. Bildisco & Bildisco*, 465 U.S. at 530, are treated as claims to be administered by the bankruptcy court under Bankruptcy Code Section 502. Section 502(b)(1), ignored by petitioners, provides for disallowance of any claim "unenforceable against the debtor...under any agreement or applicable law...."[12/] In other words, Section 502(b)(1) permits a debtor to assert any defense to a bankruptcy claim that it would have been able to assert outside of bankruptcy. *See Mazirow v. Grigsby (In re White Motor Corp.)*, 44 B.R. 563, 569 (N.D. Ohio 1984); *In re Nuisance Corp.*, 17 B.R.

12/ Together and separately, petitioners' legal positions -- that they should be paid wage-based damages during the time when they voluntarily refused to work and that they should be paid wage-based damages beyond the point at which Continental would have ceased to do business -- would seriously undermine basic bankruptcy and labor law policies. It is widely accepted that non-bankruptcy entitlements and defenses should be mirrored in bankruptcy processes. *See generally* Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 Yale L.J. 857 (1982). Were this not the case, those whose entitlements would be enhanced in bankruptcy would be encouraged to engage in strategic behavior designed to force the debtor into bankruptcy.

Specifically, claimants who think they will receive Section 502 claims for time periods when they are on strike or would have had no employment, even though outside bankruptcy they would not be paid for this time, would press wage demands to the point where their employer would enter the bankruptcy process. In theory, therefore, "bankruptcy law should mirror the rights established by labor law by enforcing them as they exist or by respecting their relative value." Thomas H. Jackson, The Logic and Limits of Bankruptcy Law, Harvard Univ. Press (1986) at 112. The Fifth Circuit's decision accomplishes exactly the theoretically correct result on both issues by denying the unions claims in bankruptcy which were unavailable outside bankruptcy.

80, 82 (Bankr. D.N.J. 1981); 3 Collier on Bankruptcy, ¶ 502.02 at 502-24,-25,-27 (15th ed. 1992).[13/]

A. Strikers Are Not Entitled To Claim Wages For Periods When They Struck Their Employer.

As the Fifth Circuit held, the applicable law under which to evaluate Petitioners' claims includes federal labor law, here the Railway Labor Act. Judge Gee, applying an unbroken line of cases denying backpay to strikers under the federal labor laws,[14/] correctly concluded that these strikers should be treated no differently than striking employees would be treated had Continental not filed for bankruptcy. Strikers, by definition performing no work for their employer, would not be entitled outside bankruptcy to claim wages for the strike period, even under the provisions of the labor laws which guarantee the right to strike and which establish remedies for employer violations of these laws.

While petitioners allege the Railway Labor Act guarantees the "right to strike," they find no cases which

---

13/ *See also In re Continental Airlines Corp.*, 50 B.R. 342, 353 (S.D. Tex. 1985), *aff'd*, 790 F.2d 35 (5th Cir. 1986) (whether a "right to payment" exists under 11 U.S.C. §101(4) is determined by law governing transaction); *In re Altair Airlines, Inc.*, 727 F.2d 88, 90 (3d Cir. 1984) (same).

14/ *See, e.g., Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 n.7 (1941); *NLRB v. Southern Greyhound Lines*, 426 F.2d 1299, 1303 (5th Cir. 1970); *J.H. Rutter-Rex Mfg. Co. v. NLRB*, 399 F.2d 356, 361 (5th Cir. 1968), *rev'd on other grounds*, 396 U.S. 258 (1969); *Comfort, Inc.*, 152 N.L.R.B. 1074, 1090 (1965), *enforced*, 365 F.2d 867 (8th Cir. 1966). The principle applies equally under the Railway Labor Act. *See National Airlines, Inc. v. IAM*, 416 F.2d 998, 1007 (5th Cir. 1969), *after remand*, 430 F.2d 957 (5th Cir. 1970); *Empresa Ecuatoriana de Aviacion, S.A. v. District Lodge No. 100*, 690 F.2d 838 (11th Cir. 1982), *cert. dismissed*, 463 U.S. 1250 (1983).

order pay to strikers as though they had been working. This is because the "right to strike" is nothing more than the employee's right to withhold his or her labor in an effort to apply economic pressure to the employer; it does not include the right to be paid for the time when the employee did no work.

The Fifth Circuit majority was correct in applying federal labor law. A contract under the Railway Labor Act, like a contract under the National Labor Relations Act, "is a federal contract and is therefore governed and enforceable by federal law, in federal courts." *IAM v. Central Airlines, Inc.*, 372 U.S. 682, 692 (1963). This Court long ago held that collective bargaining agreements and claims arising from breach of such agreements are a matter of special federal common law, not of state law. *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 455 (1957). There is no authority to indicate that, in the interpretation of this special federal common law, any court has thought workers should be paid for not working. Indeed, this Court has held that employers are entitled to permanently replace economic strikers without paying back wages to the strikers if they return, *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333 (1938), and that an employer may lock out its employees under some circumstances without incurring a wage obligation to them. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965). It would be strange indeed for the law to deny such economic weapons (or effectively preclude their use by requiring that wages be paid to strikers as well as working employees) only to employers so economically distressed that they seek refuge under the Bankruptcy Code.[15/]

15/ The O'Neill Group suggests that the decisions below provide a debtor-in-possession employer with an incentive to make drastic change in wages and working conditions in hopes of encouraging a strike while

(continued...)

Petitioners' argument that the Fifth Circuit's "reliance on unfair labor practice cases to support its opinion is misplaced" (Pet. at 13) is a tacit concession that disallowance of damages to strikers accords with labor law principles. Petitioners therefore turn to arguing (1) that contract rather than labor law should apply with respect to the strikers' claims, or (2) that this is a special case involving "severe and pervasive" changes made by the emergency work rules approved by the bankruptcy court. Pet. at 13-14. Neither argument has merit.

Petitioners fare no better under a correct application of contract law than under the labor laws they find so unhelpful. Judge Garwood's dissent, even if correct in applying contract rather than labor law, erred in its contract analysis.[16/] Far from providing a "windfall" to Continental, the majority simply placed the parties in the position they would have been in absent the strike by the employees. Under contract law, where, as here, there is no constructive discharge, failure to work for reduced wages terminates the

---

15/(...continued)
avoiding liability for contract rejection damages. Even before the 1984 amendments to the Bankruptcy Code, an employer could not make any change to a collective bargaining agreement without ultimately obtaining bankruptcy court approval. *Bildisco*, 465 U.S. at 526-27. The 1984 amendments imposed additional obstacles to such changes. *See* 11 U.S.C. § 1113; *see supra* at 9-10. Moreover, it is specious to contend that an employer who wishes to remain in business would adopt the strategy the O'Neill Group posits. A strike would additionally jeopardize the ability of an already financially vulnerable debtor to stay in business. A debtor-in-possession employer has every reason to avoid and no reason to encourage a strike.

16/ With all due respect, we fail to see how Continental obtained any "windfall" from the ruling below; Continental paid nonstriking employees for the work which striking employees refused to do, and was willing at all times to accept the strikers back into the workforce.

employee's claim to wages for the time when services were withheld. Here the bankruptcy court expressly held, in an order which was not appealed, that Continental's rejection of its collective bargaining agreements did *not* constitute a constructive discharge. *In re Continental Airlines Corp.*, 57 B.R. 845 (Bankr. S.D. Tex. 1985). Continental received no "windfall;" it was forced to recruit, train, and pay substitute labor to perform services.

B. Employees Are Not Entitled To Damages For Future Wages For Time Periods After The Employer Would Have Ceased To Do Business Had It Paid Such Wages

The Fifth Circuit was likewise correct in its unanimous decision to limit damages for future wages to the period of time when the debtor would have remained in business, for cessation of Continental's business would have resulted in every employee being terminated. Employees working under a collective bargaining agreement which does not guarantee future employment are not entitled to lost future wages. *J.I. Case Co. v. NLRB*, 321 U.S. at 335. When a nonbreaching party cannot demonstrate that it would have suffered losses from the breach, it is entitled to only nominal damages. *IBEW v. A-1 Electrical Serv.*, 535 F.2d 1, 3 (10th Cir.), *cert. denied*, 429 U.S. 832 (1976). In short, the Fifth Circuit's logic was impeccable: (1) as of some date between the petition and January 30, 1984, Continental would have ceased operating had it not rejected its labor contracts, (2) if this happened, no members of the O'Neill Group would have had jobs, and (3) therefore, without any jobs or contractual guarantees of jobs, the O'Neill Group members suffered no damages from the rejection of the collective bargaining agreement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Barry P. Simon
Senior Vice President
and General Counsel
Daniel P. Casey
Associate General Counsel
Continental Airlines,
Inc.
2929 Allen Parkway
Houston, Texas 77019
(713) 834-2273

Charles A. Shanor*
John J. Gallagher
Jon A. Geier
Paul, Hastings,
Janofsky & Walker
1050 Connecticut Ave., N.W.
Twelfth Floor
Washington, D.C. 20036
(202) 223-9000

Attorneys for
Respondent

* *Counsel of Record*

APPENDIX

APPENDIX A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CASE NO.

IN RE:

83-04019-H2-5

CONTINENTAL AIRLINES CORPORATION
DEBTOR

IN RE:

83-04020-H1-5

CONTINENTAL AIRLINES, INC.
DEBTOR

IN RE:

83-04021-H3-5

TEXAS INTERNATIONAL AIRLINES, INC.
DEBTOR

IN RE:

83-04022-H3-5

TXIA HOLDINGS CORPORATION
DEBTOR

CONSOLIDATED CASE NO.

83-04019-H2-5

August 17, 1984

MEMORANDUM OF AUTHORITIES
AUTHORIZING REJECTION OF AIRLINE PILOTS
ASSOCIATION COLLECTIVE BARGAINING AGREEMENTS

Mr. John Gallagher
Mr. David Callet
Akin, Gump, Strauss, Hauer & Feld
1333 New Hampshire Ave., N.W
Washington, D.C. 20036
Attorneys for Continental

Honorable William M. Schultz
Mr. B. J. Walter
Dotson, Babcock & Scofield
4200 InterFirst Plaza
Houston, Texas 77002
Attorneys for Official Committee of Unsecured Creditors

Mr. Michael Abram
Mr. James Linsey
Cohen, Weiss & Simon
330 West 42nd Street
New York, New York 10036
Attorneys for Air Line Pilots Association

Mr. Philip Pierce
Booth, Marcus & Pierce
79 Fifth Avenue
New York, New York 10003
Attorney for Labor & Pension Committee

Mr. Daniel Johnston, Jr.
Ross, Banks, May, Cron & Cavin
6th Floor, Two Greenway Plaza E.
Houston, Texas 77026
Local Counsel for Labor and Pension Committee

Mr. Lenard M. Parkins
Sheinfeld, Maley & Kay
3700 First City Tower
Houston, Texas 77002
Local Counsel for Continental

On September 24, 1983, Continental Airlines Corporation ("CAC"), Continental Air Lines, Inc. ("CAL"), Texas International Airlines, Inc. ("TXI") and TXIA Holdings Corporation (collectively "Continental") filed simultaneous Chapter 11 proceedings under Title 11 of the United States Code. On the 27th day of September, 1983, Continental filed a motion to reject the collective bargaining agreements with the Airlines Pilots Association ("ALPA"), the Union of Flight Attendants ("UFA"), the International Association of Machinist and Aerospace Workers ("IAM"), and the Transport Workers Union ("TWU").

On the 11th day of October, 1983, the unions filed a joint motion to dismiss the Continental Chapter 11 proceedings on the ground that the proceedings were not filed in good faith; alleging that the sole or the primary purpose of Continental in filing its proceedings was to reject the union contracts. After an extensive hearing, this court denied the joint motion to dismiss.

By agreement of the parties, the evidence introduced at the hearing on the motion to dismiss was included in the record on the motion to reject the employee agreements. The court adheres to the findings made in that decision.

The taking of evidence on the motion to reject commenced on January 30, 1984. This was over four months after these proceedings were filed but was the earliest this court's calendar would permit it to undertake this lengthy hearing. With some interruptions, the presentation of evidence continued until April 27, 1984. At the conclusion of the debtor's evidence, the court took under advisement the motion of the TWU to enter judgment denying rejection of the collective bargaining agreements with the Transport Workers Union. In addition, to some extent, the question of rejection of the various agreements with the IAM is being treated

separately. The court has not yet issued a ruling with respect to the UFA agreements.

Continental shut down its domestic operations at filing but restarted them on a substantially reduced basis on September 27, 1984.

Immediately upon the filing of this proceeding on September 24, 1983, Continental Airlines implemented "Emergency Work Rules" with respect to each of the four involved unions. These constituted unilateral changes in pay, benefits, work rules and conditions. On or about that date, Continental transmitted copies of the emergency work rules to each union by a letter indicating that these emergency work rules were just that and that they also constituted an offer to each of the unions to negotiate a new agreement. These cover letters refer to the fact that certain issues were omitted from the provisions in the rules. After receipt of these emergency work rules, ALPA and UFA went on strike (beginning October 1, 1983) without undertaking any negotiations with Continental over the emergency work rules or any new agreement based on Continental's then-existing status. Both of these unions have been on strike since that date; although a number of negotiating sessions have since take place.

The IAM and Continental had already bargained to an impasse, which was declared effective July 13, 1983. On August 13, 1983, the IAM went on strike; whereupon Continental Airlines implemented "*Interim* Work Rules" which were subsequently amended on September 12, 1983. These interim work rules were replaced on September 24, 1983, by the emergency work rules applicable to the remaining IAM employees of Continental.

For the reasons set forth below, this court has determined that the equities favor the debtor and its estate,

that the contracts with the Airline Pilot Association are onerous and burdensome and that such agreements must be rejected in order for Continental to have an effective reorganization. This rejection is pursuant to the provisions of 11 U.S.C. §365 and under the principles enunciated in the case of *NLRB v. Bildisco and Bildisco,* 104 S. Ct. 1188 (1984) decided February 22, 1984, during the evidentiary presentation in this case. That case was decided under the National Labor Relations Act. This court determines that the same reasoning and rationale are applicable to this case, which is decided under the Bankruptcy Code and the Railway Labor Act, 45 U.S.C. 151, et seq.

FACTS

Effective in 1978, the United States Congress, in its wisdom, determined that the airline industry should be deregulated to promote greater competition with respect to routes and fares, to allow more ready access of new entrants into the industry and to add flexibility of all airlines to enter new and existing markets and to charge what the traffic would bear, so to speak. Congress took this action despite the protests of the existing airlines, ALPA, the IAM, and other interested parties, who predicted that deregulation would result in financial difficulty for many of the carriers and bankruptcy or mergers for *some* and that this would cause displacement of many employees.

The aims and goals of the U.S. Congress in deregulating the airline industry appear to have been realized. Airfares have decreased dramatically in areas where the particular airline involved has not had substantial control over the market. Many new airline companies have entered into the marketplace and now compete directly with Continental Airlines and the other airlines in the industry. In order to offset this increasing competition, Continental sought to

increase its marketing efficiency by resorting to a "hub and spoke" operation; utilizing Denver and Houston as its operational hubs. While this has had some substantial beneficial effect on Continental's operations, this benefit was not sufficient to offset the fare advantages resulting from lower labor costs enjoyed by the new entrants in Continental's market. The lower labor cost of these new entrants resulted from the lack of historically based labor agreements which had escalated during the regulated period, before 1978, when the airlines could pass these increased costs on to the consumer. In this regulated atmosphere of the airline industry pre-1978, the self preservation instincts of the carriers were mitigated against and they thus did not have adequate incentive to resist the persistent and determined negotiating techniques of the powerful unions in the airline industry, such as ALPA and the IAM.

These unions have historically (and effectively) used the last highest contract as a stepping stone for each new negotiation. The result has been higher and higher wage rates and better and better provisions for the employees relating to work terms. There is no question that these unions did an outstanding job on behalf of their membership in this regard. This trend of higher and higher labor costs (negotiated by these unions) continued even after deregulation by virtue of these same techniques. No doubt upward inflation during this same time was a factor in these negotiations. The result, however, was a complex system of work rules which operated less and less efficiently for the airlines but which generated more and more time off and higher pay for the members of these unions. The additional and more unfortunate result was that it made a high and inflexible labor cost system for the major carriers coming out from the nurture of regulation. This caused many of them to be less competitive with the new entrants who were making increasing incursions into their markets.

This was particularly true of Continental Airlines, whose hub systems in Denver and (particularly) in Houston competed directly with many of these new entrants. Not being fettered with the expensive and inefficient collective bargaining agreements of the older airlines, these new entrants[1] could hire pilots, mechanics, and flight attendants in the open labor market at substantially lower prices than those that had been negotiated by Continental's labor unions. Labor is a major factor in the cost of operating an airline and is one in which there can be material variances from airline to airline. These new entrants could charge substantially lower fares that the older more established airlines, and their cheaper labor costs gave them a substantial competitive advantage over other airlines, including Continental. Continental did not have substantial control over its markets and does not now.

As a result, Continental lost substantial sums of money after deregulation. Up to September 24, 1983, the date of filing of the Chapter 11 petition, Continental had lost $521,900,000 as follows:

1979	lost $ 27.4 million
1980	lost 76.8 million
1981	lost 138.6 million
1982	lost 119.9 million
1983 to September 24	lost, 159.2 million
	$521.9 million

---

[1]Southwest Airlines had not been subject to regulation because it was an intrastate carrier before deregulation. Its labor costs have been traditionally lower. Thus while Southwest is not a "new entrant" in some respects, it is in others, since it has materially expanded its markets since deregulation. Its labor costs have been low, and it has run Continental out of at least one market with its lower fares. It is highly competitive with Continental in other markets. For convenience it will be included within the term "new entrants" in this opinion.

Although there were other factors, the main cause of Continental's losses was, as noted, that its higher labor costs prevented it from effectively competing with the low cost new entrants which have been significantly increasing their activity in Continental's markets. Continental did not have the benefit of some of the advantages enjoyed by some of its larger competitors such as United Airlines and American Airlines.

An expert employed by the Trade Creditors Committee testified that all of the major airlines are seeing "the handwriting on the wall" and are negotiating, or have negotiated, important concessions with their respective labor forces. Some have obtained significant reductions in their labor costs from those stipulated by their existing collective bargaining agreements. It was forecast that unless that major carriers eventually reduced their labor costs to the level of the new entrants, they will not survive.

Continental negotiated from time to time during the year of 1983 attempting to obtain concessions from its various unions.

During its disastrous summer of 1983, and prior to filing its Chapter 11 proceeding, Continental Airlines attempted to negotiate a $60,000,000 cost concession from the Airline Pilots Association (on an annual basis) and sought a $40,000,000 annual concession from the Flight Attendants, $20,000,000 from the International Association of Machinist and an additional $30,000,000 from its other (non-union and managerial) employees.

While the Airline Pilots Association members indicated that they were "players", nevertheless, they never committed to the requested $60,000,000 in cost concessions nor to any other number prior to the filing of the Chapter 11 proceeding. After the filing, ALPA offered concessions of

approximately $30,000,000 on an annual basis, or about half what Continental had indicated it needed from the pilots to break even before the filing of the Chapter 11 proceeding.

After the filing, Continental immediately cut back on a number of its routes and a substantial number of the flights that it had been flying. It shut down the airline from September 24 until September 27, 1983, except that it continued to fly its international routes for fear these lucrative concessions might be lost. Continental was also fearful of the domestic flights being shut down for any longer period. Its position is that it was concerned that it would lose public acceptance and that it might never fly again; at least most certainly not without substantial cost to creditors, shareholders, and all concerned, including employees.

Continental scaled back its cost structure in order to provide high quality service on a fare structure competitive with the new entrants. It appears to have been somewhat successful at this marketing technique to date; although it is not yet known what effect there will be if a full scale fare war should be engaged in by a substantial number of its competition. Nor is it known what the full effect of additional competition will be from carriers now entering the field, including the "New Braniff", which began flying during the spring of 1984 during the evidentiary presentation in this case.

REASONABLE EFFORTS

The Supreme Court in *NLRB v. Bildisco and Bildisco,* supra, (hereinafter "Bildisco") required that before acting on a petition to "modify or reject" a collective bargaining agreement, the bankruptcy court should be persuaded that reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution. The purpose of this is to

serve the policies (if not the letter) of the Labor Act.[2] However, the bankruptcy court is not required to determine that the parties have bargained to impasse nor to make any other determination outside the field of its expertise.

The unions assert that the involved principle requires the bankruptcy court to hear evidence and pass on the substantive details of all relevant negotiating sessions. This is part of an effort to show that Continental acted unreasonably in the substance of its proposals to the respective unions. The thrust of this theory is to place the bankruptcy court in the posture of determining that the parties should agree to and in what respect the company offers vary from this standard.

It is precisely this kind of inquiry which this court understands that *Bildisco* (and prior cases) determined that this court should avoid. *Bildisco* pointed out that the national labor policies of avoiding labor strife and encouraging collective bargaining generally require that employees and unions reach their *own* agreements on terms and conditions of employment free from governmental interference. In addition, the Court observed that a determination that the parties have bargained to impasse is one ordinarily made by the National Labor Relations Board and that to involve the bankruptcy court in that kind of determination would divert the bankruptcy court to an area outside its area of expertise. See also *American National Insurance Co. v. NLRB,* 187 F.2d 307, page 310 (5th Cir. 1941), affirmed 343 U.S. 395, page 404 (1952).

The labor agreements with ALPA, UFA & IAM are complex and the resulting cost of virtually each provision is

---

[2]In that case it was the National Labor Relations Act ("NLRA") 29 U.S.C. 158 et seq. This case involves the Railway Labor Act ("RLA") 45 U.S.C. 151 et seq.

difficult of ascertainment, partly because it varies substantially with each level of flying operation. Asking this court to pass on the merits of the respective offers would impose on the bankruptcy court a substantial burden in areas far removed from any expertise this court might have.

It is the opinion of this court that it is not intended by the Supreme Court that the bankruptcy court examine the substantive merits of the negotiations to determine whether the parties respective proposals are reasonable but rather only that a genuine effort has been made to reach agreement with the certified representatives of the employees. In the same phrase, the Supreme Court required this court to determine as well that "such efforts are not likely to produce a prompt and satisfactory solution." In other words, if a genuine effort has been made by the debtor to reach agreement and this effort is not likely to produce a prompt solution under all the existing circumstances, the court is authorized to *act* on the debtor's motion to reject. Of course this duty of the debtor to recognize the bargaining representative and to continue bargaining exists both before and after any rejection is permitted.

The *Bildisco* court avoided using the terms "good faith" and "bad faith" bargaining; traditional terms in labor negotiations and labor law. Presumably this was intentional. Perhaps this is an indication that the Supreme Court intends for the Bankruptcy Court to stay out of even *that* area of determination. The "good faith - bad faith" determination is simply a determination of whether or not a party has a desire to reach an agreement at all. It requires *some* assessment of the substantive terms of an offer, as well as the willingness to bargain and the effort to do so. *NLRB v. Herman Sausage Co.*, 275 F.2d 229 (5th Cir., 1960). However, even a "good faith - bad faith" determination is far less of an intrusion into

the bargaining rights of the parties than a determination of whether the substantive terms of a proposal are "reasonable".

The Supreme Court has noted that great caution should be used in finding bad faith in cases other than wherein there is a "desire not to reach agreement", for doing so risks infringement of the strong federal labor policy against governmental interference with the substantive terms of collective bargaining agreements. *Chicago & Northwestern Railway v. United Transportation Union*, 402 U.S. 570 (1971). The Fifth Circuit has ruled to similar effect in many cases, including *Gulf State Manufacturing, Inc. v. NLRB*, 579 F.2d 1298 (5th Cir. 1978), aff'd in pertinent part 598 F.2d 896 (5th Cir. 1979)(en banc).

In addition to this strong policy against such determinations by a court, the burden on the bankruptcy court to make an inquiry into the reasonableness of the terms of offers (as suggested) would appear to be excessive. This court has allowed this type of evidence in this proceeding because of some of the uncertainties in the law that existed at the time of this hearing. The result has been that the hearing lasted almost three months. No doubt future case law will give the Bankruptcy Courts guidance with respect to this issue as to future hearings on applications to reject collective bargaining agreements.

Be that as it may, this court allowed detailed evidence concerning the substance of numerous bargaining sessions which occurred both before and after the filing of the Chapter 11 petition on September 24, 1983. This was at a great cost of court time and may have consumed as much as half or more of the hearing time. From this evidence, the court concludes (1) that Continental has made considerable and reasonable effort to reach agreement with the unions involved herein for voluntary modification of their respective

bargaining agreements, (2) that Continental has bargained in good faith with respect to those efforts, (3) that no agreement has been reached and (4) that those efforts are not likely to produce a prompt and satisfactory solution. It is the intention of Continental to reach agreement with these employee groups consistent with its current economic situation. It has made numerous attempts to do so.

That Continental continued to urge in its bargaining session that it must maintain its labor cost levels at or about those provided for in the emergency work rules does not constitute bad faith negotiation under all of the circumstances of this case. It is not bad faith for a party to insist on the terms of a proposal and to maintain that posture. "Open mind need not mean a mind without conviction nor need it mean a mind easily swayed by argument." It need not make a proposal or require the making of a concession. *American National Insurance Co. v. NLRB,* supra, page 309.

A party may try to achieve its objectives and need not yield. *NLRB v. Tomco Communication, Inc.*, 567 F.2d 871, 884 (9th Cir. 1978). It may even withdraw an earlier offer, including a tentative agreement on certain provisions, if circumstances change. *NLRB v. Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720 (5th Cir. 1978). A position taken in good faith need not be abandoned or compromised. The debtor is entitled to insist on a proposal, however unacceptable to the union, and if the insistence is genuinely and sincerely held it may be maintained even if it procudes a stalemate. *NLRB v. Herman Sausage Co,* 275 F.2d 299 (5th Cir.), rehearing denied 277 F.2d 793 (5th Cir. 1960), see *American National Insurance Co. v. NLRB,* supra, page 309 n.3.

The unions' position that a party must ask for more than it wants in order to meet somewhere in the middle is not

accepted by this court. That was urged as being the traditional method of negotiating. However, the facts in this case show that this is not the traditional situation facing negotiators. This is especially true where, as here, Continental has been in extreme financial difficulty and needed prompt modification of its collective bargaining agreement.

Having just filed a Chapter 11 proceeding and being the first air carrier to attempt to fly through such a proceeding, Continental was in a period of uncertainty and needed the flexibility allowed it by the so called emergency work rules promulgated September 24, 1983, immediately upon filing the proceeding. As noted, Continental substantially cut back on the number of cities it served and the number of flights to the cities it continued to serve. It substantially reduced its work force. At the present time it is facing increasing competition from even additional new entrants coming into the market since the filing of this proceeding. It is just now approaching profitability but may be faced with a fare war in the near future. Under the existing circumstances, Continental's bargaining position appears reasonable to this court. Although it severely cut back the wage levels and liberalized its working rules, it somewhat patterned these after those of other airlines with which it was then in competition. Over half of the union membership in each category has crossed the picket lines and come to work for Continental under the terms of the emergency work rules (eighty percent in the case of Flight Attendants) as have newly hired personnel.[3]

---

[3]Some of the jobs subject to the IAM agreements were eliminated because Continental could (and did) contract these services out to third parties at cheaper rates than the IAM contract specified (i.e. cabin cleaners, fuelers, flight kitchen personnel, etc.).

In *Neon Sign Corp. v. NLRB*, 602 F.2d 1203 (5th Cir. 1979), the Fifth Circuit found that an employer engaged in good faith bargaining even though it insisted on wage decreases. The company was experiencing serious financial problems and lower wages were essential to its survival.

That the proposals submitted by the company were for provisions similar to those agreed to by the same union at other companies is evidence of the employer's good faith. See *NLRB v. American National Insurance Co.*, 343 U.S. 395, 405 (1952); *Gulf State Manufacturers v. NLRB.*, supra.

That the unions have not accepted Continental's proposals does not in and of itself mean that they are unreasonable or that they are not attempting to reach agreement with Continental. Indeed, the concessions that are being asked of the pilots, the flight attendants, and others is substantial and greatly affects a standard of living to which many of them have become accustomed. This is a difficult idea to adjust to. Nevertheless, herein, the purposes of the National Labor policy have been well served. Bargaining by the debtor with its unions has been going on for well over a year. No agreements could be reached with the IAM and an impasse was declared. No agreement has been reached with ALPA or UFA.

Prior to September 24, 1983, the terms offered the respective unions were better than those required by the debtor post filing. Yet no agreement could be reached on those terms. Just before filing, Continental made major presentations directly to its employees in order to reach agreement on concessions which this court finds were necessary for it to survive, but the unions (except TWU) did not agree. A great deal of negotiation has taken place since filing. To require further bargaining at this level before

acting on the motions to reject seems to this court to be unrealistic and useless.

Indeed, the failure of the court to act at this stage of the proceeding (two months after the substantial evidentiary hearing concluded) may be impeding eventual agreement. As noted above, the parties have a continuing duty to bargain even after rejection. If agreement is to be reached, it will occur after the issue of the rejection of the agreements has been determined. Perhaps this and the improving income posture of the debtor will allow agreement to be reached in the future.

On the other hand, this court is concerned that the Airline Pilots Association does not intend to reach an agreement with Continental on terms the airline can afford. ALPA appears to have strong motives for seeing that the carrier is shut down as an example to the other carriers whose pilots are represented by this large and extremely powerful union. It represents pilots throughout the airline industry in the United States. Other carriers are having difficulty in the post-deregulation period and are requesting concessions from their pilots. The obligations of ALPA to its other (non-Continental) members would make it difficult for this union to recommend settlement with Continental to the extent needed by Continental in order to lower its labor cost sufficiently for it to be competitive in its fare levels and to return to profitability. Outside of the courtroom, ALPA has asserted "we must continue to apply whatever pressures are required to preclude New CAL [from] operating profitably. These pressures will include both economic sanctions and all legal action open to us...." In the courtroom, ALPA has verified that its purpose is to shut down Continental. The Airline Pilots Association has made it clear, and has convinced this court, that its *primary* aim is to shut down Continental Airlines.

While ALPA's actions (to the extent they are legal) may be allowed by prevailing labor laws, wherein they are a means to achieve an agreement, it appears to this court that other motives are involved, at least in part. Thus ALPA's actions to shut down Continental and/or to deprive it of profitability reflects on ALPA's good faith in bargaining and on any equities involved. ALPA's attitude further seems to be at odds with the spirit and purpose of the Bankruptcy Code.

ALPA has maintained that its three principal areas of concern are (1) preservation of the union as the bargaining representative of Continental's pilots (union security), (2) safety and (3) seniority. It also contends that Continental has bargained unreasonably by failing to agree with ALPA's proposals.

Continental has at all relevant times recognized ALPA as the bargaining representative of its pilots, although it has not honored the "dues checkoff" provision of the collective bargaining agreement since the strike began.

THE "SAFETY" QUESTION

The evidence in this case shows that ALPA has publically indicated that it and its members are vitally concerned with the safety of the public flying on Continental Airlines since the October 1, 1983 strike. The pilots failed to mention that most of the pilots employed by Continental are those off of ALPA's seniority list (i.e., are ALPA pilots). The newly-hired pilots must go through required training and must be qualified. That some may be less experienced does not of itself indicate lack of ability. In addition, the court would note that safety is the responsibility of the Federal Aviation Agency, who must revoke or suspend the certificate

of Continental Airlines should Continental not adhere to the safety standards imposed by this federal agency.

In short, while crying "Safety! Safety!" in the courtroom and to the public, ALPA has failed in its meager attempt to offer evidence that Continental Airlines is unsafe to fly. It has offered almost no evidence of this to this court, and has apparently failed to convince the FAA, in whose jurisdiction and responsibility lies the safety of all airlines, including Continental.

ALPA was singularly unsuccessful in providing a scintilla of evidence to this court that safety is a genuine concern on the part of the pilots or that there is substantial evidence of unsafe conditions on Continental's airplanes.[4]

This court has concluded that ALPA's campaign is simply a scheme designed to further ALPA's efforts to close down Continental Airlines for its own economic purposes. Among other things, this would act as a warning to other carriers who must deal with ALPA at the bargaining table in other areas.

Based on the evidence offered to this court, this promotion by ALPA appears to be a misuse of the labor laws of this country. In any event, the court declines to deny rejection on the basis of ALPA's claim that safety is at stake.

---

[4]Were ALPA genuinely concerned over the *public's* interest, it has it, within its power to release some of its striking pilots back to Continental to help fill its pilots needs. Continental has requested this. It would have prevented further erosion of Continental's seniority list - an issue in the settlement negotiations. ALPA is under no obligation to do this but its failure to do so upon request is indicative of the fact that *self* interest is its true motive in this endeavor; not that of the public.

THE SENIORITY ISSUE

Some of the major provisions of the collective bargaining agreements by and between Continental Airlines and the Airline Pilots Association (including the old Texas International agreement with ALPA) relate to seniority. These are very sensitive and important provisions for the pilot employees (as well as the other union employees with respect to their respective collective bargaining agreements). ALPA and the other unions argue that Continental Airlines has not been reasonable in its efforts to settle because of Continental's position with respect to the relative position of "new hires" that have been employed since the pendency of this proceeding and after the strikes of Continental's major unions, including ALPA.

The unions further argue that the seniority provision of the contract is a non-executory right which has become "vested" in the pilots and therefore cannot be rejected under the provisions of §365 of the Bankruptcy Code. This court disagrees.

There is no precise definition of "executory contract" in the Bankruptcy Code. At least one of the accepted definitions of the term "executory contract" is a contract that is so far unperformed on both sides that the failure of either party to complete performance would constitute a material breach excusing further performance of the other. *Matter of Tonry*, 724 F.2d 467 at page 468 (5th Cir. 1984). See *Countrymen, Executory Contracts and Bankruptcy*, 57 Minn. L. Rev. 439 (1973); 58 Minn. L. R. 479 (1974) and House Report No. 95-595, page 347 (1977); Senate No. 989, 2d Sess. 58 (1978), 2 Collier on Bankruptcy §365.02 (1983).

Even though a pilot may have achieved a certain level of seniority within the meaning and under terms of the

collective bargaining agreement between ALPA and Continental, nevertheless, the right of employment at Continental by any particular pilot is not absolute. In order to enjoy the use and benefit of any seniority position, the pilot must be employed by, and perform services for, Continental Airlines. It is therefore clear that under the collective bargaining agreement both Continental and each employed pilot have reciprocal obligations during the life of the contract. In other words, performance is due by both parties. This is likewise true for every other employee that has seniority under a collective bargaining agreement. Thus, under the Bankruptcy Code, such a provision is executory, at least insofar as the right of a striking pilot to return to work after the strike is settled.

Under Continental - ALPA collective bargaining agreements, pilots were entitled to be placed on the seniority list and to maintain their relative status thereon (absent other agreement) under the terms and conditions of the agreement. As a pilot went higher on the seniority list, he had the privilege of being recalled, or his employment maintained, in priority to pilots lower on the seniority list. In addition, as changes were made in the system such as routes, equipment, bid runs, vacations, etc., the higher the seniority the higher the priority for the pilot to have his choice in these areas. Furloughs were made from the bottom of the seniority list. Further, after pilots are furloughed, under the agreement they were recalled in order of seniority. Often this required extensive retraining by Continental, wherein a pilot changed type of equipment or was out of service beyond a specified amount of time.

When Continental filed its proceeding and drastically cut back on the number of cities it served and the routes it was flying to the remaining cities, Continental had to furlough a number of pilots on the payroll. Continental immediately

went on a campaign to get the remaining pilots to agree to fly under the emergency work rules. Once the strike began on October 1, 1983, Continental maintained a telephone "bank" in which pilots were called and requested to fly for Continental notwithstanding the strike. Those that did return to work filled the positions then available and, once recalled, maintained their relative priority they enjoyed on the seniority list pre-petition. Therefore, the relative seniority of working pilots is not the issue as this seniority is being honored by Continental.

For a period of time after the strike, Continental attempted without success to reach agreement with ALPA on the terms of a new collective bargaining agreement. As the early initial chaotic days of filing passed and Continental began to rebuild its system, Continental needed additional pilots and made a strenuous effort to get striking pilots to return to service. There was some success in this area, but as Continental expanded its routes it was unable to fill out its list of needs from the ALPA pilots then on strike. By instructions from its chief operating officer, Continental delayed hiring pilots not on the seniority list ("new hires") until it felt it had to do so to service its re-expanding route system. Continental did not undertake employing new hires (pilots off their existing seniority list) without adequate warning to the Airline Pilots Association and its membership. ALPA was told on October 5, 1983, that replacements would be hired if the strike was not over quickly, and Continental sent letters to this effect to all of its pilots. Continental told all of its active pilots that it would not displace working pilots in the future to accommodate returning strikers. Striking pilots had the opportunity to return to work with Continental as it expanded its operations, but many declined to do so, although more than 50% of its pre-petition pilots did return to work.

After Continental reached the conclusion that it had to employ new hires, and began doing so in early November, 1983, it advised these new pilots that they were permanent and would not be replaced by striking pilots returning to work at Continental after the strike ended or upon each striking pilot's individual decision to cross the picket line. That permanent replacements would be hired if the striking pilots would not return was well know to ALPA and its membership long before Continental undertook this practice. Subsequently, since early November, 1983, as pilot positions were available in the system, Continental has hired all pilots off the seniority list who were willing to return (which pilots have continued to enjoy their relative seniority position) and has hired new pilots from outside its seniority list. As noted, once employed, the seniority system has functioned for each pilot as it did before the filing of these proceedings. Had Continental not employed pilots who were not on its seniority list the airline would have had to significantly limit its operations. This would have served ALPA's purposes but it would have made Continental's ability to reorganize substantially less likely. It was necessary to hire these replacements in order for Continental to discharge its duty to the public to make a reasonable effort to continue flying. However, in efforts to negotiate a settlement, ALPA has pointed its finger at Continental for refusing to agree on a "back to work" agreement under which the striking pilots would return to work and would resume their old relative seniority positions ahead of any newly-hired pilots (who would naturally have lower seniority status in most, if not all, situations). Such an agreement would result in Continental's furloughing most, if not all, of these new hires, despite express promises to these individuals that they would not do this. ALPA says that Continental, by not so agreeing is bargaining in bad faith and/or is unreasonable.

Continental has maintained that it will take returning pilots only to the extent that positions are (or become) available and will not agree to "create" positions for returning strikers by furloughing new hires.

Continental defends its position by urging to the court that it has a legal obligation (the oral representations and agreement) to the individual new hires as well as a moral obligation. Continental further argues that if it agreed as ALPA has suggested, the resulting furloughs of the new hires would put Continental in a bad bargaining position with respect to any future negotiations that might take place between ALPA and Continental within the next several years. Continental argues that its position does not constitute bad faith bargaining and is entirely reasonable under the circumstances.

Should an agreement be reached with ALPA, it is doubtful that it would extend beyond a one or two-year period, as has been customary between these parties. Many of these new hires left, or declined to accept, other employment positions when they came to work for Continental. It would appear that they have relied upon Continental's representations. If Continental replaces these permanent new hires despite its representation to the contrary, Continental might well be at the mercy of ALPA at the end of any new contract term because of its potential inability to employ replacement pilots should ALPA then undertake a new strike. Continental would have effectively lost credibility with the pilot community in this country, risking the probability that it could not hire replacement pilots in the event of any future strike threat. For Continental to agree as ALPA suggests would place a powerful negotiating weapon in ALPA's hands with respect to future negotiations. In this court's opinion, given all of the circumstances of this case, Continental has valid reason to be concerned over the use of

such weapons by ALPA. In all probability, Continental will not have *completed* any reorganization process within the next two, three nor even five years.[5] The resulting leverage to ALPA could place in jeopardy any confirmed plan of arrangement.

The strong public right of the worker to engage in a legal strike must be observed. However, the working pilots (including those not on the pre-petition seniority list) and the other working employees have done what they can to preserve the value of the debtor for the benefit of all. Once-successful reorganization is achieved or is foreseeable, can the striking employee be heard to claim that Continental is unreasonable in not agreeing that the striking employee may return to work whether a position is available or not and demand his or her former seniority status as a legal right, when it results in the new hire being furloughed?

This court cannot agree that a policy such as ALPA suggests would be in the best interest of the reorganization process.

Although any "legal" and/or "moral" obligation of Continental to the new hires is an important factor, in this court's view there is a much stronger reason for sustaining Continental's position that these needed new hires are now permanent employees and that they should not be replaced by Continental to create positions for returning striking pilots as part of any back-to-work agreement. These reasons are the public policy of keeping the air carrier flying (as provided in the Interstate Commerce Act and in the Railway Labor Act) and in the equally important public consideration and policy

---

[5]By this is meant the completion of any payout period provided for in a confirmed plan of arrangement. It is not unusual for such pay periods to extend beyond three or even five years.

of the Bankruptcy Code that a financially troubled company make the highest and best use of its assets and facilities in order to maximize the recovery to creditors and to preserve the business operation for the economy of the country. It is not the least of such policy that it promotes the preservation of this particular job market.

The striking pilots made a choice, although it was no doubt was a hard choice. When one makes a choice, it is not always possible to continue to retain both options, and in fact usually this is not the case. When great principles conflict, a court must attempt to determine what the best overall public policy must be under the circumstances. These striking pilots made their decision knowing the potential consequences. They were aware that Continental was asking them to return, that Continental needed pilots to expand its operations, a necessary step if it was to have a successful reorganization, and that Continental was going to hire replacement pilots on a permanent basis if they did not return, and that Continental would not voluntarily allow displacement of these persons who accepted employment under extremely troubling circumstances.

A reorganizing debtor must be efficient in its employment practices, since its ability to survive is at stake. It would not be consistent with the overall purposes of the Railway Labor Act and/or the Bankruptcy Code to thusly penalize the new hire after he has been successful in assisting the debtor to return to profitability.

Certainly Continental needed to give assurance to these new hires that they would not be replaced when the strike was over. No one knew how long the strike might last. This emphasizes (and is consistent with) the strong public policy of the Railway Labor Act to keep the carrier in operation. When you couple this public policy with the

circumstances that the carrier in this instance was in a weak financial condition, one must conclude that while the union is free to use self-help under labor law, the debtor likewise had the right to use self-help as Continental did here. There is legal precedent for the position taken by Continental. *Empresa Equatoriana De Aviacion v. District Lodge,* 690 F.2d 838, (8th Cir. 1982); *National Airlines, Inc. v. International Association of Machinists and Aerospace Workers, et al,* 416 F.2d 998 (CA 5, 1969) cert. denied, 400 U.S. 992 (1971); *Flight Engineers International Association v. Eastern Airlines, Inc.,* 359 F.2d 303 (2nd Cir. 1966); *International Association of Machinists v. Central Airlines, Inc.,* 355 S.W.2d 803 (Civ. App. Texas, 1962) *cert. denied,* 371 U.S. 934 (1962), *reh'g denied,* 371 U.S. 970 (1963).

In the case of *Flight Engineers International Assoc. v. Eastern Airlines, Inc.,* supra, ALPA itself successfully espoused the position that its members should permanently replace striking flight engineers.

In *National Airlines, Inc.,* supra, page 100¢, the court stated: "Under both the N.L.R.A. and the Railway Labor Act, a carrier need not discharge those hired to replace strikers. The hiring of replacements for the strikers would have been consistent with the attempt to restore service." In *Empresa Equatoriana,* supra, the court stated on page 846 that "the carrier could replace strikers where necessary to its operation." On page 847 it said: "The strikers who were properly replaced are entitled to be placed on such [a preferential hiring] list, to be rehired when their replacements quit or when a similar vacancy arises. Without the hiring preference, the concept of replacement becomes indistinguishable from discharge."

The hiring of permanent replacement employees in a strike situation has been held to be an acceptable practice

under the National Labor Relation Act. In *NLRB v. Mackay Radio and Television Co.*, 304 U.S. 333 (1938), the Supreme Court held that permanent replacements hired in an economic strike need not be terminated to make room for returning strikers. On page 345, the court said it is not "...an unfair labor practice to replace the striking employees with others in an effort to carry on the business" and that an employer is "not bound to discharge those hired to fill the places of strikers upon the election of the latter to resume their employment in order to create places for them." See also *Gulf States Manufacturers, Inc. v. NLRB,* supra, page 1327 and 1328.

To require the debtor to place in effect at this time rules which would cause the termination or furlough of these people who have made a vital contribution to the effort to reorganize, would in this court's opinion, serve as bad precedent for future reorganization cases.

While Continental is free to make the choice of agreeing or not agreeing with ALPA on this point, this court declines to accept ALPA's view that Continental has engaged in unreasonable bargaining (or bad faith) in refusing to accept ALPA's position on this point.

THE STATUS QUO PROVISIONS OF THE RAILWAY LABOR ACT, THE EMERGENCY WORK RULES, AND REJECTION OF THE CONTRACTS AND THEIR TERMS

As noted above, immediately upon filing of its Chapter 11 proceeding on September 24, 1983 Continental unilaterally implemented new wage rates and work rules for each of its union groups, including the pilots. Continental undertook this action notwithstanding that the agreements with the pilots were not then open for negotiation and, further, the

negotiating procedures of Section 6 of the Railway Labor Act had not been exhausted, as specified by the Act ("RLA").

The unions argue that notwithstanding §365 of the Bankruptcy Code, the status quo provisions of the Railway Labor Act prohibit any unilateral change in the wage rates or work rules "on the property" until all negotiations pursuant to the scheme of the status have been exhausted. The Unions, including ALPA, argue that there is a difference between making unilateral changes in a contract which might be rejected under the provisions of §365 of the Bankruptcy Code and the statutory provisions of the RLA, which (they allege) continue the terms of the contracts in effect until the bargaining procedures have been completed. The Unions argue that §365 does not authorize rejection of statutory requirements, as opposed to contractual provisions, i.e. this court cannot authorize changes in the wage rates and work rules of a carrier governed by the RLA until the Section 6 bargaining procedures have been exhausted. ALPA no doubt would concede that such procedure may take years (indeed it has already taken about nine months since filing without effect).

Unquestionably the Railway Labor Act contains "status quo" provisions. As noted by the 5th Circuit in the *United Industrial Workers of the Seafarers International Union of North America v. Board of Trustees of Galveston Wharfs,* 400 F.2d 320, page 329 "the objective of the Railway Labor Act is continuance of the status quo until the statutory procedures of the Act have been exhausted." And "As the Supreme Court stated in *Order of Railway Telegraphers v. Railway Express Agency,* 1943, 321 U.S. 342, 347, 64 S. Ct. 582, 586, 88 L. Ed. 788, 792, the failure of the carrier to proceed as provided by the Railway Labor Act of 1926, then applicable, leaves the collective agreement in force throughout." The court also noted with approval the language

of *Order of Railway Conductors v. Pitney,* 1946, 326 U.S. 561, to the effect that the object of Section 6 is to maintain the status quo pending the expiration of the period provided by the section for allowing the process of negotiation, mediation and conciliation to have a play. It is to prevent changes being made until these processes have been exhausted or the prescribed waiting period has expired without bringing them into effect. The 5th Circuit also noted that the Railway Labor Act is more concerned than the National Labor Relations Act ("NLRA") with continuance of the employers operations and the employer-employee relationship. This is evidenced by the fact that while bargaining is the first and last step under the NLRA it is only the first step under the Railway Labor Act in a ladder that leads to the White House if differences cannot be resolved.

Generally speaking, this principle is recognize by virtually all labor law precedents. On the other hand, while the Supreme Court in *Brotherhood of Railway and Steamship Clerks, Freighthandlers, Express and Station Employees, ALF-CIO, et al v. Florida East Coast Railway Company,* 384 U.S. 238 (1965), recognized the requirement by law for the railway to abide by all the rates of pay, rules, and working conditions specified in the existing collective bargaining agreements until the termination of the statutory mediation procedure, the court allowed exceptions "upon specific authorization of [the U.S. District] court after finding a reasonable necessity therefore". The Supreme Court therein recognized that one of the primary purposes of the Railway Labor Act is to keep the carrier operating. On page 246 the court notes "that the procedures of the Act are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute". In that nonbankruptcy case, the Supreme Court held that under emergency conditions the carrier could implement new terms and conditions governing the labor force as long as those

changes were necessary for the railroad to fulfill its duty to continue operations, provided the power to make such changes is closely confined and is supervised. Thus, the Supreme Court has recognized that the status quo provisions of the Railway Labor Act must, in some instances, bend to the exigencies of the situation.

The evidence in the instant case shows that, had Continental not been able to significantly reduce its labor costs (by the unilateral implementation of less costly and more efficient work rules and pay rates) at the time it filed this proceeding, Continental would have run of cash and would no longer be operating at the present time. It would have had to shut its doors even before this hearing commenced. Continental was simply in no position to continue its operations under the wage rates and working conditions contained in its agreements with the Airline Pilots Association. It did not have the money to do so nor the ability to acquire it. In addition, under the circumstances, Continental could not even have reduced its operations (as it did beginning September 27, 1983) and still have complied with the terms of its agreement with ALPA. Continental reduced them significantly, and it needed the low cost, the efficiency, and the flexibility of its emergency work rules in order to do so.

ALPA's contention cannot be sustained under the law. By virtue of § 1167 of the Bankruptcy Code (11 U.S.C. §1167), the U.S. Congress provided that notwithstanding §365 a debtor-in-possession under Chapter 11 of the Code cannot change the wages or working conditions of employees of a debtor subject to the Railway Labor Act *except* in accordance with Section 6 of such act. Changes in wages working conditions would and are otherwise authorized by §365 of the Bankruptcy Code. The Congress then expressly provided in §103(g) of the Bankruptcy Code that Subchapter IV of

Chapter 11 applies only to a case under such chapter concerning a *railroad. Section 1167 is part of Subchapter IV of Chapter 11.* Continental is not a railroad. Under the statutory scheme thusly set forth Congress, in its wisdom, by clear implication provided that a debtor governed by the Railway Labor Act need not comply with Section 6 of that act before making unilateral changes in wages and work rules if it is in Chapter 11 and is not a railroad. The statutory scheme of the Bankruptcy Code thereby provides for the action taken by Continental in this instance. It might well be noted that the Bankruptcy Code was enacted in 1978, the same year that airline deregulation became effective.

Further, since the contracts are no longer immediately enforceable after filing, the changes in wages and work rules are accomplished not by the employer's unilateral action, but rather *by operation of law. NLRB v. Bildisco & Bildisco,* supra, 104 S. Ct. 1188 at page 1200. In *Bildisco,* the Supreme Court laid down a pragmatic rule in dealing with the National Labor Relations Act. This court is persuaded that the reasoning of the Court in that case is likewise applicable here in relation to the RLA. As noted above, this debtor would not have survived implementation of the suggestion by the Airline Pilots Association that Continental could make no post-filing change in its wage rates and working conditions.

In *Bildisco,* the Court held that the authority of a debtor-in-possession to seek rejection of the collective bargaining agreement was not qualified by the restrictions of Section 8(d) of the NLRA, which section established detailed guidelines for midterm modification of collective bargaining agreements. The Court noted the policies of flexibility and equity built into Chapter 11 of the Bankruptcy Code. These policies were desperately needed by Continental at filing in order to continue its duties as a carrier. As noted,

performance of this duty to continue public service is one of the primary purposes of the RLA. At least to that extent, the Bankruptcy Code and the RLA are entirely consistent and compatible.

The Supreme Court did not fully accept the "new entity" theory utilized by the Court of Appeals in its Bildisco opinion, 682 F.2d 72 (3rd Cir. 1982), but the Court did observe that the debtor-in-possession, while the same "entity" which existed before the filing of the bankruptcy petition, is nevertheless empowered by the Bankruptcy Code to deal with its contracts and property in a manner that it could not have done absent the bankruptcy filing. The court noted that the fundamental purpose of reorganization is to prevent a debtor from going into liquidation with an attendant loss of jobs and possible misuse of economic resources. The court noted further that recapitalization of a debtor could be jeopardized if the debtor-in-possession was saddled automatically with the debtor's prior collective bargaining agreement. The Bankruptcy Code specifies that the rejection of an executory contract which has not been assumed constitutes a breach of the contract which relates back to the date immediately proceeding the filing of a petition in bankruptcy. 11 U.S.C. §365(g)(1). The court further noted that if the debtor-in-possession elects to continue to receive benefits from the other party to an executory contract pending a decision to reject or assume, the debtor-in-possession is obligated to pay for the "reasonable value" of those services, which, depending upon the circumstances of the contract may be what is specified in it. Should the debtor-in-possession elect to assume the executory contract, however, it assumes the contract *cum onere*.

The Supreme Court concluded that the filing of the petition in bankruptcy means that the collective bargaining agreement is no longer immediately enforceable and may

never be enforceable again. Specifically the Court concluded that after the filing, the collective bargaining agreement is not an enforceable contract within the meaning of NLRA Section 8(d), and that it follows that the debtor-in-possession need not comply with the provisions of Section 8(d) prior to seeking the bankruptcy court's permission to reject the agreement. The court further stated that in a Chapter 11 case the "modification" in the agreement has been accomplished not be the employers unilateral action, but rather by operation of law. The court further noted that even the National Labor Relations Board had conceded in that case that the cumbersome and rigid procedures of Section 8(d) need not be imported into the bankruptcy proceedings. The Supreme Court also held that the debtor-in-possession need not bargain to impasse before seeking rejection and that these provisions of the National Labor Relations Act must be subordinated to the exigencies of bankruptcy.

In this court's opinion, the rationale of the Supreme Court in *Bildisco* is equally applicable to the Railway Labor Act and the status quo provisions of that act must give way to the realities of bankruptcy. A company whose financial life is threatened should not, under rational public policy be forced to adhere to principles which, though of good service in times of ordinary financial health, would, as in this case, jeopardize the company's existence.

The unions' attempt to distinguish *Bildisco* because it dealt with the National Labor Relations Act, whereas Continental is subject to the Railway Labor Act. However, this court is not persuaded that in the situation that Continental now finds itself, there is any persuasive difference from the parameters outlined by the Supreme Court.

If ALPA's argument is followed, the statutory "status quo" provisions of the Railway Labor Act would put

a financially troubled debtor to the task of an arduous (and perhaps impossible) process before it could obtain the economic relief which might well be necessary to its continued operation. The result in many instances, including this one, might well be that liquidation would result unnecessarily while lip service was being given to the alleged purposes of the Railway Labor Act, and many jobs would be unnecessarily lost. Clearly the overriding public policy is that more jobs should be saved under these unfortunate circumstances rather than that higher wages be paid for a short period of time before the debtor's financial heart stops beating. The demise of a company is too much of a price to pay for strict adherence to Section 6 bargaining requirements. Any policy which would tend to precipitate this demise could not truly be consistent with the spirit and purposes of the RLA, much less the Bankruptcy Code.

Once a company is legitimately in Chapter 11, as Continental has been found to be, the provisions of Title 11 and the principles of *Bildisco* are applicable to its collective bargaining agreements even though they are otherwise governed by the RLA. Unilateral changes may be made by the carrier *at filing*, at least where rejection of the agreement is later approved by the court. However, the debtor is still required to make reasonable payment for the services it receives during the pendency of the proceeding and is obligated to bargain with the certified representatives of the employees both before and after rejection.

Continental was the first airline ever to attempt to fly through a Chapter 11 proceeding. Had Continental requested interim relief from the contract wage levels and work rules and had it been possible to have had such a hearing immediately, such relief would have been granted by this court; given the unusual circumstances concerning its cash position, the changes it made in its level of flying, its

competitive situation, and the uncertainties that existed immediately after the filing of this petition.

The fact that other urgent matters were pending on this court's docket prevented it from hearing the evidence on the motion to reject for a few months. When the evidence did begin on January 30, 1984, it extended until April 28, 1984.

It appears to this court that to have required negotiations between the time of filing and the institution of emergency work rules unilaterally imposed by Continental Airlines on its pilots (when operations resumed three days after filing) would not only have required a useless and nonfruitful act (no agreement has been reached nine months later) but would have prevented Continental from resuming domestic operations at that time. Further since rejection is being allowed, had Continental not reduced its wage payments, it would have expended more monies in reliance on the contractual provisions than those necessary to obtain these same services. Continental would have paid more than the reasonable value of these services based on market rates, given all of the circumstances in this case.

Further delays in restricting Continental's flying operations would also have resulted in loss of those advantages it had as a going business. At worst, this could have resulted in the destruction of its business and at best it would have severely diminished its ability to reorganize. In either of these events, it would have stopped payment of wages to all employees for either a longer period or for all time.

RELATIVE EQUITIES

As has been noted, deregulation has caused some difficulty to the industry majors, including Continental. Other

carriers have furloughed employees and many unions have granted concessions to various carriers in light of the increasing competition. Continental has suffered substantial losses since deregulation and now has a substantial debt structure and debt service. This debt service makes it difficult to compare Continental to other airlines in terms of what costs are necessary for it to be profitable.

An effort has been made to show that Continental was solvent when it filed its proceeding and that rejection should not be permitted. The effort to prove solvency stemmed from the appraisal of Continental's air fleet at an amount greater than that shown on its books. In other words, its airplanes have a greater market value than book value. It is axiomatic that for Continental to realize market value from these airplanes they would have to be sold. If they were sold Continental could not operate then. Without airplanes to operate, Continental would have additional obligations from rejections of its numerous leases on ground space and from other executory contracts. Whether the net result, taking all resulting liabilities into account, would show that Continental is solvent is speculative at this time. No effort was made to show this result. Resulting obligations from rejection of executory contracts are not now on the books of Continental as a liability.

At filing, as determined in connection with the motion to dismiss, Continental had reached the point where it no longer had free assets upon which to obtain any credit and certainly could not obtain credit on the basis of its potential profit margin. Further, assuming Continental was in fact solvent, had Continental adhered to the labor costs specified in the respective collective bargaining agreements, Continental would have soon become insolvent unless it ran out of *cash* and had to close its doors before this occurred.

Moreover, if assets were liquidated (even at the best market price) there would be no further need for employees at Continental, including those who would seek to be employed under the collective bargaining agreement. Thus a *sale* of Continental's air fleet would defeat the purposes of such agreements entirely.

Therefore, it seems that for these purposes, a liquidation test for solvency seems foolhardy and a self-defeating way of evaluating Continental, under the circumstances. As a going concern, Continental was losing substantial sums of money. An evaluation of the assets on this basis (capitalized earnings) would not show Continental to be solvent. In addition, at the filing Continental was not paying its debts as they matured.

Unless a company can become profitable and maintain that posture consistently, it is inevitable that it go out of business. If a reorganization proceeding is to succeed, prior accrued indebtedness must be paid out of future profits (unless the company is liquidated). If there is no excess of money over and above operating expenses, there is nothing to pay prior indebtedness with; whether it be secured or unsecured indebtedness, including any damages resulting from rejection of collective bargaining agreements.

The unions have recognized that Continental needs relief from the high labor cost which results from adherence to the respective collective bargaining agreements. Each has indicated in testimony before this court that it would (and/or did) agree to significant concessions in modification of these agreements. (Even the IAM's representative testified that it would - or might back off of its requested "industry standard" wages.)

The non-union employees agreed to their share of relief (by 80% vote). ALPA points out that Continental realized the savings it requested (pre-filing) from the IAM group as a result of the IAM strike and the interim work rules imposed on August 13, 1983 and by contracting out of much of the IAM employee work. The pilots intimate in testimony that they would have agreed to the $60,000,000 requested of them and that Continental should have interpreted their "signals" to mean that they would agree to concessions at that level. The UFA has said it would agree to the $40,000,000 in concessions requested by Continental prefiling (and even more) but that the problem in reaching agreement has been the dispute over the value (UFA's costing) of the concessions offered by UFA. Continental says they are worth far less that the $40,000,000 requested, while UFA says they were worth much more (i.e., $50,000,000). However, the UFA never sent its costing experts to confer with Continental's - so the issue was never resolved. TWU did agree to the concessions requested by Continental pre-filing.

This evidence is indicative of the recognition by these unions that Continental cannot survive under the costs of these agreements as written.

When Continental resumed flying operations September 27, 1983 (after filing its Chapter 11 and being shut down for three days), it severely reduced its fare level on all flights in order to entice the flying public back onto the airline. It also needed to restore the confidence of travel agents who had been "booking away" from Continental as rumors of its financial troubles had grown (pre-filing). This had the desired effect. When it became apparent that the public perceived that Continental could fly through a Chapter 11, Continental increased its fare level but only to the point they were competitive with the low cost airlines flying in competition against them. However, unlike the low-cost

competition, Continental still served hot meals on certain flights, and maintained free baggage handling and interchange with other airlines, a reservation service, and others amenities that are normally associated with a full-service airline. This has been criticized severely by the unions, but it has apparently been successful for Continental. Continental had tried maintaining higher fare levels and full service as a means of competing with the new entrants and had found it to be very unsuccessful.

Continental has implemented this marketing program and has set its fare levels in order to maximize its yield. It is now projecting a profit and has been meeting its projections for the first time in a long time. Taking into consideration all of the existing circumstances, this court concludes that Continental's business plan is reasonable.

The unions point out that the emergency work rules unilaterally imposed by Continental at filing would result in annualized cost savings to Continental far in excess of the $150,000,000 requested just before filing. The unions contend that the annualized savings would be in the area of $250,000,000. It should be noted that the $150,000,000 in concessions was calculated merely for Continental to break even. Further, at the time of the filing of its Chapter 11 proceeding, many uncertainties existed and many changes were taking place within the airline. Continental was cutting back its operations severely for a period of time. It did not intend to return fully to its prefiling level of flying. It was and is facing increasing competition. There is potential for a fare war and skirmishes are even now being fought.

Continental needed the lower costs and flexibility provided by the emergency work rules (or at least substantially so) in order to survive, right itself financially, and progress toward a stable and profit-making posture on a

consistent basis. Substantial sacrifices have been, and are going to be, necessary for this airline to revitalize itself. The current working employees are making that sacrifice. They have recognized that meat and potatoes come first; dessert on the terrace comes later.

Because of the collective bargaining agreements the pilots have enjoyed standards of living that make the required sacrifices hard to adjust to. The court can understand why a pilot making at, near, or over $100,000 per year has set a standard (or cost) of life style that makes adjusting to a salary of $43,000 or less extremely difficult. Small wonder the pilots resist such a change. But economics can be harsh. It has been to the airline industry in general and to Continental in particular. The pilots have managed to negotiate (over the years) pay benefits and work rules which are onerous and non-productive, especially when compared to those of some of the other competitive carriers. The result was a significant cost imbalance and a substantial advantage to much of Continental's competition. In one sense, the pilots had simply priced themselves (and/or Continental) out of the existing market.

The *average* 1982 earnings for Continental captains (excluding TXI pilots) were $89,673 the 94 DC-10 captains salary *averaged* $101,793 in 1982. An analysis by the Economic Analysis and Information Services Department of ALPA concluded on July 28, 1983 that between 1980 and 1982 "pilots average earnings are greater than" the average earnings of accountants, attorneys, college professors, dentists and PH.D chemists and that only doctors earn more than pilots but that pilots salaries were increasing at a faster rate than those of any other profession.

Furthermore, the evidence showed that the actual hard-hour utilization of pilots was less than 60 per month,

pre-petition. Scheduled flying days for pilots in May, 1983 (presented as an example) averaged 14 days for regular DC-10 and 727 pilots on domestic flights. In addition, pilots got substantial vacation time (between 16 and 44 days per year depending on seniority). This vacation time can, at least in part, be used to further reduce scheduled flying time.

Federal Aviation Regulations permit utilization of pilots up to 100 "block hours" in a calendar month, not to exceed 1,000 block hours per year.

It should be noted that traditionally Continental's labor force has historically been over 50% non-union; 6,776 out of 12,008 employees pre-petition and 3,553 out of 5,763 employees post-petition (56.4%) as of January 31, 1984.

As observed above, more than 50% of the currently active employees in each *unionized* job category[6] (and more than 80% of the active flight attendants) have elected to cross their own union's picket lines. This appears to be indicative of these employees' acceptance of the need of Continental for relief from the respective collective bargaining agreements and their willingness to work at the wage levels and under the working conditions (including increased productivity) being currently offered by Continental.

Continental is offering a living wage to its currently flying pilots. In addition, it is offering to its employees a profit-sharing plan guaranteeing each a participation in 25%

---

[6]At the time the IAM struck, 12:01 a.m. EDST, August 13, 1983, Continental sold all three of its flight kitchens (at Los Angeles, Denver and Houston) and contracted out this service and that of cabin cleaning and fueling because it could contract this service from third parties substantially cheaper than it could perform them with IAM employees under the terms of the IAM collective bargaining agreement.

of the profits of the airline from the first dollar upward. It has also proposed to this court for approval a stock ownership plan which would make the employees 35% owners of the company on a fully diluted basis. They as a group, would then be the largest shareholder of the company. Overall, morale appears to have increased post-filing to a very high level. As of April, 1984, Continental had grown to approximately 6,000 employees and was projecting 8,000 employees by the year end.

As of April 1, 1984, Continental had 1,070 active pilots, including those currently in training or on leave. Of this number, 494 were new hires and 576 were from its pre-petition seniority list. It employed 1,471 flight attendants, of which 270 were new hires and 1,201 were from its pre-petition seniority list. All of the ground instructors were still on the payroll as were 21 out of the 35 dispatchers (14 dispatchers were still on furlough).

Beginning in October, 1981, Continental management personnel endured a 10% pay cut and non-union employees had to forego scheduled pay increases. In January - February, 1982 personnel department positions were reduced by 35% and general staff levels in other offices were reduced 15%. In 1983, 25% of the remaining management staff jobs and 15% of the line management positions were eliminated. Non-unionized personnel and management were required to work extraordinarily long work hours and even split shifts in some instances. Just prior to the filing of bankruptcy, management employees had a 15% pay cut and reduction in benefits, and, as noted, non-unionized employees voted to accept similar reductions.

It is true that there were "snap back" provisions relating to these management pay cuts, and their salaries have been increased (snapped back) in part already. However,

under the evidence, this court is convinced that Continental management employees are being paid materially less than competitive salaries for top management positions that other companies are paying for similar management skills. In addition, as noted, Continental management personnel have been required to work extraordinarily arduous schedules. Further reduction in their wages could result in loss of key employees, and it appears that Continental has in fact already suffered from this problem.

This court finds that non-union and management personnel have made sufficient sacrifices to justify rejection of the respective union contracts when balancing the rights between them. This is particularly true when you consider the high level of wages and salaries which had been bargained for by the various unions and agreed to by Continental, as set forth in these contracts.

Labor costs, were a major factor contributing to Continental's bankruptcy. If the contracts had not been rejected, the administrative claims resulting from reinstating the contracts (and their resulting high cost) from the date of filing would in and of itself be highly damaging to the prospects of reorganization. Further, if the company is liquidated under Chapter 7, the contracts would be rejected as a matter of law, 11 U.S.C. §365(d), and this rejection would likewise relate back to the date of filing.

Low labor cost are necessary for Continental at the present time and at least for the near term, foreseeable future, in order for Continental to be competitive.

Virtually no effort was made by ALPA to show that Continental could afford to pay materially more to its pilots than it is now doing under the emergency work rules . The only effort was a calculation to show that if Continental raised

its fare levels without losing any of its passenger miles, it could do so. However, no evidence was introduced that convinces this court that if Continental materially raised its fares it would not lose a substantial portion of its flying customers.

There is little loyalty, if any, among passengers. Passenger miles are essentially fungible. Ticket prices remain the single most important element in attracting the flying public.

The court rejects the motion that Continental could materially raise its ticket prices and materially increase its pilots labor costs, unless, and until, its competition also raises ticket prices. That adventure has already been embarked upon by Continental in the past; all to its financial dismay.

It appears to this court that substantial jobs will be preserved as a result of rejection of these contracts. Certainly the creditors are likely to get more under any plan of arrangement than in liquidation; in fact, it is usually necessary for the court to find that they will receive not less than they would under Chapter 7 liquidation before any plan of arrangement can be confirmed. 11 U.S.C. §1129(a)(7). Any such plan must be based on future earnings. From the evidence, it appears that there will be no earnings unless these contracts are rejected. Labor costs are such an important element in Continental's ability to operate profitably and to remain competitive that it cannot offer a plan of arrangement until it knows if the contracts are to be rejected, and, thereby, what its future labor costs are likely to be. The respective contracts must be rejected to get any new capital. No viable business plan can include a return to all of Continental's pre-petition labor costs.

Rejection will no doubt result in reduction in standards of living of many of the employees, and possibly even hardship in certain cases. Nevertheless, under the circumstances and the economics currently prevailing, there appears to be no reasonable alternative.

The unions argue that this court cannot make necessary determinations in order to allow rejection of the contract in light of the fact that Continental has not offered a plan of arrangement, because this court cannot assess the viability of such a plan or the need to reject the contracts as an integral part thereof. This court disagrees. The Supreme Court in *Bildisco* understood the difficulties in assessing the outcome of a potential reorganization in the beginning stages of such a proceeding. At this time the court cannot say that Continental will have a confirmed plan of reorganization, nor even that the confirmed plan will be successful, but it has determined that without rejection no viable plan providing for future operation by Continental of its own air fleet is possible. The Supreme Court noted that "the Bankruptcy Court inquiry is of necessity speculative, and it must have great latitude to consider any type of evidence relevant to this issue." I believe that the findings of this court have satisfied this issue as required by *Bildisco* and other cases. In this instance, the inability of the parties to reach an agreement is in itself a deterrent to any plan of arrangement.

There was testimony that Continental could not afford any substantial increase in its current labor costs. A return to pre-petition labor costs under the ALPA contracts would preclude Continental from effective competition with the low cost, new entrants; some of which have negotiated contracts with the very unions which oppose Continental's motion to reject.

The unions argue that if the court allows rejection of the agreements, it should only allow rejection of those parts of the agreements that are burdensome and (presumably) should require affirmation of all other parts. This court has no true way to know the financial impact of each particular provision in the agreements. The Supreme Court in Bildisco noted that the bankruptcy court "need not determine that the parties have bargained to impasse or make *any other determination outside the field of its expertise.*" (Emphasis added).

The ALPA and UFA contracts are extremely complex. This court could not possibly rewrite them for the parties. if it tried to do so, in all likelihood serious mistakes would be made. As noted in the *Bildisco* opinion, the National Labor Policies generally require that employers and unions reach their own agreements on terms and conditions of employment free from governmental interference. The court cited *Howard Johnson Company v. Hotel Employees,* 417 U.S. 249 (1974); *NLRB v. Burns Security Services,* 406 U.S. 272, 282-294 (1974). See also *Chicago and Northwestern Railway Company v. United Transportation Union,* 402 U.S. 570, page 579, footnote 11, referring to the strong federal labor policy against governmental interference with the substantive terms of collective bargaining agreements.

There is no provision in the Bankruptcy Code which would provide for rejection in part. Historical case authority indicates that executory contracts must be accepted *cum onere* or not at all. The Supreme Court in *Bildisco* did not provide for any such authority by this court; especially since the court noted that acceptance *must* be cum onere and cited *In re Italian Cook Oil Corp.,* 190 F.2d 994, 996 (CA 3 1951) for that proposition.

Continental has a continuing duty to bargain with the certified representatives of its employees in good faith. These parties are themselves in a better position to know the effect of the various provisions of their future agreements, which, by their nature, are extremely complex. Should this court impose restrictions or conditions on the rejection of these agreements, the court would not only be involved in an area outside of its expertise but it would violate strong principles of labor law that government not interfere in this bargaining process. This court should not impose on either party its own notions of what is fair or reasonable or economical under the circumstances. Neither the Bankruptcy Code provision (§365) nor applicable case law mandates that this court set any terms or conditions on the rejection and this court declines to do so in this instance.

The unions next argue that if the court is going to allow rejection of the agreements it should impose *conditions* on the rejection, such as requiring Continental to (1) reoffer its pre-petition concession package, (2) reimpose the "non-economic" provision of the agreements, and/or (3) implement those provisions which have been "signed-off" on in the various labor negotiations. The unions cite *In re Parrot Packing Co., Inc.*, 99 C.C.H. Labor case P10, 550 (U.S.D.C. No. Dist. Indiana, Ft. Wayne division, case number 83-10127) August 2, 1983, as precedent for this proposition.

The concessions that were requested pre-petition do not necessarily relate to the current labor cost requirements of Continental. The question of which provisions are in fact non-economic is in issue. Those "signed-off" provisions were not intended by the parties to be binding unless and until a complete and integrated collective bargaining agreement was reached; they were simply tentative and conditional. On the other hand, it is certainly fair for the unions to bring up these

tentative agreements as well as the non-economic provisions in the future bargaining sessions that must take place.

If this court has the authority to impose such conditions it declines to do so in this instance.

The unions, including ALPA, have not seriously challenged with evidence that Continental is in serious financial condition or that it was losing money, nor that it needed serious economic concessions if it were to continue. Nevertheless, ALPA urges that the emergency work rules have inflamed the pilots.

The insult to the unions stems from the effrontery of the employer escaping from the "bonds" of their labor agreements before their very eyes; and in a highly visible way. However, this employer, while it appears to be the same, now has different characteristics and powers. Section 1107 of Title 11 proscribes that a debtor-in-possession has all of the rights, duties, and responsibilities of a trustee. Were there to be an "actual" trustee (i.e. a disinterested third person who could be perceived as acting on behalf of all interested parties) this pill (having this modicum of sweetener) might not be so difficult to consume without even the benefit of liquid refreshment. Small wonder that frustration so conceived is the bearer of ill will and dismay.

Nevertheless, economics have changed substantially in the airline industry. Recognition must be given to this. The ALPA contracts give no such recognition nor any flexibility to deal with the existing circumstances. Under these circumstances, rejection of these burdensome agreements should be, and are, permitted under the law.

To comply with the RLA, ALPA (as well as Continental) must continue to bargain. ALPA must lay aside

other considerations and recognize that this is an economic problem. Economic problems are rarely, if ever, resolved in the courtroom. The striking ALPA pilots need the bargaining expertise of its union now more than ever. If properly and steadfastly exercised, the bargaining ability of ALPA can determine what level of pay and benefits Continental can afford to pay under existing economic circumstances. Whether, ALPA has alienated the working ALPA pilots to the extent that it has lost the leverage of support from this group remains to be seen. However, ALPA and Continental must bargain from the relative positions in which they now find themselves.

Signed this 17th day of August, 1984.

/s/ R.F. Wheless, Jr.
R.F. Wheless, Jr.
U.S. Bankruptcy Judge

APPENDIX B

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	)	
	)	
CONTINENTAL AIRLINES, INC.,	)	Case No. 90-932
et al.,	)	through 984
	)	
Debtors.	)	

ORDER APPROVING O'NEILL GROUP
LITIGATION SETTLEMENT

Upon the Motion ("Motion") of Continental Airlines, Inc. ("Continental") to Approve O'Neill Group Litigation Settlement ("Settlement Agreement") filed by Continental on October 22, 1991, the Court having considered said Motion, the Memorandum In Support thereof and the attachments thereto, and the Court having considered the Adair Pilots' objection to said Motion filed November 12, 1991, and the Court having conducted a hearing on said Motion on November 26, 1991, and there appearing good cause therefore, the Court makes the following findings of fact and conclusions of law:

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and Bankruptcy Rule 9019. This matter constitutes a core proceeding pursuant to 24 U.S.C. § 157.

2. Continental filed its petition for relief under Chapter 11 of Title 11 of the United States Code on December 3, 1990 ("Petition Date").

3. Since the Petition Date Continental has continued in the operation and management of its business and properties under §§ 1107 and 1108 of the Bankruptcy Code.

4. The Settlement Agreement (attached as Attachment 1 to the Memorandum in Support of Motion of Continental Airlines, Inc. to Approve O'Neill Group Litigation Settlement) resolves claims with potential value in excess of $100 million against the estate including (a) virtually all of the remaining employee-related claims filed against a corporate predecessor of Continental ("Old CAL") in a prior bankruptcy proceeding in the Bankruptcy Court for the Southern District of Texas ("Continental I"), (b) litigation arising out of a 1985 strike settlement agreement between Old CAL and the Air Line Pilots Association ("ALPA"), and (c) litigation in the Texas state courts arising out of a side Letter between Texas Air Corporation and ALPA. Included among the claims resolved by the Settlement Agreement are claims by over 200 pilots whom Continental has treated as having resigned or retired during the 1983-85 pilot strike at Continental. Those pilots claim a right to reinstatement and backpay which, if successfully prosecuted, would be both costly and extremely disruptive to the interests, seniority and morale of Continental's current pilot workforce.

5. By resolving this litigation, the Settlement Agreement will in large part put an end to a labor dispute that has endured for almost nine years and should enhance morale among the current Continental pilot workforce. The Settlement Agreement further benefits the estate by avoiding litigation of the O'Neill Group's motion to transfer venue of

these proceedings to the Texas bankruptcy court pursuant to 11 U.S.C. § 1014, thereby allowing these proceedings to continue without interruption or delay.

6. Of the $20.9 million of potential consideration available under the Settlement Agreement, approximately $17.9 million or $5.6% has been accepted. Of that total, 30% or approximately $5.4 Million will be paid in cash in 15 equal monthly installments of approximately $360,000 per month, commencing after a plan of reorganization is confirmed herein. Seventy percent of the consideration accepted, or approximately $12.5 million, will be provided in the form of general unsecured pre-petition claims to be scheduled in the name of each settling pilot. In addition, Continental will provide approximately $1.8 million in attorneys' fees to the O'Neill Group's counsel, to be paid in eight monthly installments after confirmation of a plan. The amount of consideration (showing both the cash and claim portion) to be provided for each type of claim settled under the Agreement is set forth below.

Claim Type	Cash	Claim
1. Resigned or retired pilots	$2.16 mil.	$5.04 mil.
2. Furlough Pay	$2.46 mil.	$5.75 mil.
3. Contract Rejection Damages	$350,000	$817,000
4. Other Bankruptcy Claims	$199,500	$465,500
5. Side Letter Claims	$ 36,375	$ 84,875
6. Class Action Claims	$164,250	$383,250

7. A Bankruptcy Court must consider four factors for approving settlement agreements pursuant to Bankruptcy Rule 9019: (a) the probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of litigation involved, and the expense, inconvenience and delays necessarily attendant to it; and (d) the paramount interests of creditors and a proper deference to their reasonable views in the premises. *See Drexel v. Loomis,* 35 F.2d 800 (8th Cir. 1929), as adopted in *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414 (1968).

8. First, Continental is fully apprised of all facts necessary to evaluate the risks associated with the claims and litigation being settled, and it is prudent for Continental to eliminate these risks in order to achieve certainty through the Settlement Agreement. Although Continental believes that it has strong defenses to the O'Neill Group's claims and litigation, it also recognizes that, in varying degrees, there are risks associated with that litigation and that continuation of these claims and litigation will impose a significant burden on the estate.

9. Second, the claims are all adverse to Continental and thus present no "difficulties in the matter of collection."

10. Third, the litigation with the O'Neill Group has endured for over nine years and has consumed large quantities of management resources and legal fees. Disapproval of the Settlement Agreement would result in continued litigation with the O'Neill Group on many fronts and the continued expenditure of significant time, attention, and money, all to the detriment of Continental and its

creditors. Resolution of the O'Neill Group's litigation will enable Continental to focus on achieving a successful reorganization, not on past disputes, and will thus enhance the labor relations climate at Continental.

11. Fourth, the Settlement Agreement serves the interests of Continental's creditors by, in addition to the benefits described above, avoiding any disruption of these proceedings that might occur if Continental were required to litigate the O'Neill Group's motion to transfer venue of this bankruptcy case. Thus, the Settlement Agreement will hasten a successful reorganization.

12. The Official Committee of Unsecured Creditors has not objected to approval of the Settlement Agreement.

13. The Court has considered the objections of the Adair Pilots, finds them to be without merit, and they are denied.

14. The Court therefore concludes that the Settlement Agreement is in the best interests of Continental's estate.

Based on the foregoing, IT IS HEREBY ORDERED, this 26th day of November, 1991 that

1. The Motion of Continental Airlines, Inc. to Approve O'Neill Group Litigation Settlement is granted.

2. The Settlement Agreement, attached as Attachment 1 to the Memorandum in Support of Motion of Continental Airlines, Inc. to Approve O'Neill Group

Litigation Settlement, is approved in its entirety pursuant to Bankruptcy Rule 9019.

3. Continental is authorized to execute of Settlement Agreement.

/s/ Helen S. Balick
United States Bankruptcy Judge